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I hereby Certify,

That the following Petition is in my judgment well founded, and that the same is not interposed for delay.

Nathan H. Frank

Proctor for Appellee.

580

No. 1769

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

APOSTLES.
(IN TWO VOLUMES.)

THE CALIFORNIA NAVIGATION AND IMPROVEMENT COMPANY (a Corporation), Petitioner,

Appellant,

vs.

THE UNION TRANSPORTATION COMPANY (a Corporation), THE PETER MUSTO COMPANY and R. L. SCOTT, Claimant,

Appellees.

In the Matter of the Petition of the CALIFORNIA NAVIGATION AND IMPROVEMENT COMPANY (a Corporation), Owner of the Steamer "MARY GARRATT," for Limitation of Liability.

VOL. II.

(Pages 241 to 533, Inclusive.)

Upon Appeal from the United States District Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F.

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(Testimony of George E. Cameron.)

Q. Where are the books?

A. When I resigned the secretaryship, I turned them over to Mr. Gillis.

Q. There are books in existence, are there, that you kept showing these items?

A. I don't know. I have not seen them since I turned them over.

Q. Your testimony is what you recall of those books? A. Yes, sir.

Mr. EELLS.—I move that the evidence be stricken out and ask that the books be produced.

Mr. FRANK.—That is a novel motion. The books of the company to prove this, were in my possession at the time of the fire, and in my office, and were burned up on April 18th, at the time of the fire. I have some records here, and you are perfectly welcome to them.

Mr. EELLS.—Q. Mr. Cameron, have you any recollection of the items for which this $5,500 was paid?

A. Well, I know that Mr. Gillis spent about $1,500 personally of his own money, and $4,000, that he borrowed from the Stockton Savings and Loan Society which was also spent for the saving of the "Dauntless." It was always understood it took about $5,500 in cash.

Q. You do not know what it was spent for?

A. Principally for labor and material.

Q. The $4,000 was spent by the company, and $1,500 by Mr. Gillis?

A. He loaned the company that.

(Testimony of George E. Cameron.)

A. He loaned the company $1,500?

A. Yes, sir.

Q. How do you know that?

A. We had no money to pay bills, and Mr. Gillis put the money up.

Q. You know the bills were paid, do you not?

A. Yes, sir.

Q. Do you know what the bills were? I am not asking where the money came from, but I am trying to find out what it went for.

A. Mostly for payroll.

Q. For men employed there?

A. For men employed there. Then there were divers that cost a great deal of money. We bought a lot of piles. I remember that cost a great deal of money.

Q. Can you be any more explicit than that about it costing a great deal of money? How much was spent for labor, and how much for piles?

A. It would be pretty hard for anyone to remember back six years.

Q. You know the items and amounts?

A. I remember approximately. It was $5,500 because we often have spoken of it.

Q. That is how you came to remember it?

A. Yes, sir, and I remember we borrowed $1,500 from Mr. Gillis, and I remember that Mr. Gillis borrowed $4,000 from the Stockton Savings and Loan Society.

Q. But do you remember that all of this money went into the "Dauntless"? A. Yes, sir.

(Testimony of George E. Cameron.)

Q. How do you know?

A. I was keeping the books at the time.

Q. I am asking you about the books. What account was that charged to, and how was it counterbalanced?

A. On account of the raising of the steamer "Dauntless."

Q. And you were in San Francisco then, were you? A. Yes, sir.

Q. Was all this money spent for the steamer "Dauntless"? A. Yes, sir.

Q. The $5,500 just?

A. There was more than that. There is an account in this book of mine—(pointing).

Mr. FRANK.—Yes, I am trying to find it.

A. (Contg.) about what it cost.

Mr. FRANK.—Q. Is that the memorandum that you refer to (pointing)?

Mr. EELLS.—He has not referred to any, yet.

Mr. FRANK.—Yes, he said there was a memorandum in a book of his.

A. Yes, sir. I wrote that in there.

Q. Is that the memorandum that you refer to?

A. That is the memorandum that I refer to.

Mr. EELLS.—Q. Is this your writing, Mr. Cameron? A. Yes, sir.

Q. What is the book?

A. The minutes of directors' meetings.

Q. Here is "Minutes of Directors' meeting of December 9th, 1902," That is the meeting, is it?

A. Yes, sir.

(Testimony of George E. Cameron.)

Q. These are your notes of that meeting?

A. Yes, sir.

Q. "Of the above receipts"—referring to a tabulated statement of the business for the year ending December 1st, 1902, immediately preceding the entry—"there was received on account of sale of the "Dauntless," $9,500. Of the above disbursements"—also referring to the same statement—"there was paid out, account raising the "Dauntless," and for the liquidation of the following bills contracted previous to December 1st, 1901, James Gillis loan $1,504.93; Stockton Savings and Loan Society, $4,000; H. R. Worthington (compromise) $200; W. J. Brady, ditto, $300. The bills of H. R. Worthington and W. J. Brady were for work done on the "Columbia" and disputed by Mr. Gillis on account of overcharge, the compromise claims being a reduction." That is the only memorandum, is it? I have quoted correctly from these minutes, have I, Mr. Cameron? A. Yes, sir.

Q. That is the only memorandum that you find in the book on that subject? A. Yes, sir.

Redirect Examination.

Mr. FRANK.—Q. This loan of James Gillis of $1,504.93 and the Stockton Savings and Loan Society of $4,000, I understand you to say, were the moneys borrowed to pay off the expense of raising the steamer? A. Yes, sir.

Q. And was so expended? A. Yes, sir.

(Testimony of George E. Cameron.)

Recross-examination.

Mr. EELLS.—Q. You do not know, however, for what it was expended, that is, how the items were made up?

A. I could not state what each item was. I could tell about what the money was paid for.

Q. You had nothing to do with the work itself?

A. Except that I paid the bills. As they came in, we would go through them. Mr. Gillis would O. K. them and I would pay them.

Q. Were they not paid by check, Mr. Cameron?

A. Not always. Large bills might be. The labor bills we would go to the bank and cash the check, and bring it to the office and pay the men.

Q. You would pay all labor bills at the office?

A. We would pay all labor bills at the office.

Q. So there was nothing to distinguish the labor on the "Dauntless" from the labor on the "Weber," or any other boat you had?

A. The check at the bank would not show anything.

Q. The man would present his time check at the office, and get paid for it?

A. No, sir; we would have a pay-roll.

Q. The pay-roll was kept at the office?

A. Let me think. It is a long time ago. They might have paid by voucher. I cannot swear to that. It was usually customary to make out a list of what they called the pay-roll.

(Testimony of George E. Cameron.)

Redirect Examination.

Mr. FRANK.—Q. Do you remember keeping a separate account in your accounts known as the "Dauntless" raising?

A. Yes, sir.

Q. You kept each item paid for it in that account? A. Each item separate.

Q. As secretary, you did know what was paid out for the raising of the "Dauntless"?

A. Yes, sir.

Q. This statement that you have placed in the records here, was that a general statement from accounts at that time?

A. My idea in writing that in as I remember it, was, we sold the "Dauntless" and a question might arise at some time what became of the money, and that would show what became of part of it any way.

Mr. EELLS.—Q. What became of the money according to that account was, that you paid $1,504 to Mr. Gillis, and $4,000 of it to the Stockton Savings and Loan Society? A. Yes, sir.

Mr. FRANK.—Q. That was paying back the money that you had used for raising the vessel?

A. For raising the "Dauntless."

Q. I understand you to say that you had paid at least that much, and it might have been more?

A. It might have been more.

Q. But you know you expended all the money that you borrowed upon that occasion for that particular purpose? A. Yes, sir.

(An adjournment is here taken until Friday, November 15th, at ten o'clock A. M.)

[Testimony of Alfred E. Anderson, for Claimant.]

Friday, November 15th, 1907.

ALFRED E. ANDERSON, called for the claimant, Union Transportation Co., sworn.

Mr. FRANK.—Q. Give us your name and occupation?

A. My name is Alfred E. Anderson. I am Secretary and Manager of the California Transportation Company.

Q. The California Transportation Company is a corporation that is managing or operating steamers of the class of the "Dauntless" on the rivers and harbors of San Francisco? A. Yes, sir.

Q. How long have you been connected with the California Transportation Company?

A. Eighteen years.

Q. Does the company own and operate many steamers?

A. Twelve or fourteen, I don't know which.

Q. All of that same general type, stern-wheel steamers, operating on the bay and rivers tributary?

A. All stern-wheel steamers operating on the bay and rivers.

Q. Are you familiar with the type and construction of the steamer "Dauntless" at the time she was sunk?

A. If you ask me, if I am familiar with the steamer "Dauntless," I cannot say I ever made a survey or inspection of her.

Q. You have seen her? A. Many times.

(Testimony of Alfred E. Anderson.)

Q. You know what her construction is, the nature of her construction?

A. From report, not from survey—actual survey.

Q. You know her sister steamer the "Captain Weber"?

Mr. LEVINSKY.—That is assuming that the "Captain Weber" is a sister steamer.

Mr. FRANK.—I will state that it is already in the testimony that she is. It was so testified on a previous occasion.

Q. You have examined the "Weber"? You know the nature of her construction and size, the nature of her machinery, and all of the details of that vessel?

A. I do.

Mr. EELLS.—Don't you think you are leading the witness a little?

Mr. FRANK.—Perhaps I am. But it is preliminary.

Mr. EELLS.—I know, but it is a very vital point, how far he is familiar with it, and you are telling him all about it.

Mr. FRANK.—Q. Previous to the loss of the "Dauntless," did I understand you to say that you had seen her frequently? A. Yes, sir.

Q. State whether or not you have been on board of her?

A. I think I have been on board of her—I think I was on board of her, but it is very indistinct in my mind. Very likely I was not. I could not say. I have been on board of her since she was sold to the present owner—since he acquired title. Before that,

(Testimony of Alfred E. Anderson.)

I could not state any way that I was ever aboard of the "Dauntless."

Q. Assuming that she is of the same type and construction as the "Weber," what, if anything, can you say was a fair value of that vessel in a sound condition at the time she was sunk?

Mr. LEVINSKY.—Objected to as immaterial, irrelevant and incompetent, on the ground that the witness does not know he was ever on the "Dauntless." If he were on her, he never made any inspection, and it does not appear when he saw and inspected the "Weber," or the condition of the "Weber" at the time he saw and inspected her, and it does not appear she was in the same condition that the "Dauntless" was at the time the "Dauntless" was sunk, or that he has any knowledge of the value of vessels.

A. Assuming she was of the same construction as the "Weber"?

Mr. FRANK.—Q. What would be a fair value of her in a sound condition at the time she was sunk?

A. How old was the vessel when she sunk?

Q. Don't you know, Mr. Anderson, how old she was? Don't you know all about the "Dauntless" without resorting to any technicalities in respect to it? Don't you know how old she was?

A. Well, Mr. Frank, I have an idea. I believe she was 9 or 10 or 8 years old, something like that. I could not say accurately. I do not know just when this collision occurred; it has slipped my mind.

Q. This collision occurred in 1901, I think, or 1902. I think 1901.

(Testimony of Alfred E. Anderson.)

Mr. LEVINSKY.—1901.

A. That made her how many years old?

Mr. FRANK.—Q. Do you know how old she was, or about how old she was?

A. Assuming she was between 8 and 10 years old?

Q. Yes, and that she had been kept up in good condition, and in good repair, and also that she had not very long before this accident had a Texas deck built on her, and about 3 years after her original construction, giving her extra accommodations of 23 rooms. Give us what, in your opinion, is a fair valuation of her. She was also nine years and a half old.

A. Well, in my opinion, a vessel of that age, and, as you state, assuming she was in sound condition, should be worth approximately, $50,000.

Q. In that estimate have you taken into consideration the extra work of putting a Texas deck on her and 23 extra rooms?

A. Yes, sir, I think so. Of course, I have in my mind values at that time, not values at the present time.

Q. At the present time, I assume the values would be greater?

Mr. LEVINSKY.—We object to that as irrelevant, immaterial and incompetent.

Mr. FRANK.—I understand the values at the present time. I am trying to get the meaning of his answer.

A. It is generally understood that the values of all such property has increased. It costs more to

(Testimony of Alfred E. Anderson.)

create at the present date than it did several years ago, for reasons that we all know of.

Q. Then, as I understand you, you say about $50,000 would be a fair value for that vessel at the time she was sunk?

A. I would consider it a very fair value.

Q. During your connection with the California Transportation Company, have you, or have you not, had experience in the building or construction of vessels of that class, and the buying and selling of them?

A. I have.

Q. And from your general knowledge of the buying and selling and building of other vessels besides those owned by the California Transportation Company, could you say whether or not that is the basis on which you estimate values?

A. Yes, sir; that is the only basis that I work under, from personal knowledge.

Q. That is your knowledge and experience of 18 years in that business, both with reference to your own vessels and other vessels on the Bay?

A. Yes, sir. I have no experience with other vessels, only our own.

Q. Have you any knowledge with reference to vessels of other companies, the buying and selling and constructing of them, from general report?

A. Only in a general way, what I have observed. We have never constructed vessels or repaired vessels at our shipyard for outside parties. We have confined ourselves strictly to our own vessels.

(Testimony of Alfred E. Anderson.)

Q. You have your own shipyard at which you construct and repair vessels, and from your experience in your own shipyard, you know what the values are, Is that what I am to understand?

A. Yes, sir.

Cross-examination.

Mr. LEVINSKY.—Q. I understood you to say, Mr. Anderson, you never made an inspection of the "Dauntless"? A. That is correct.

Q. You would not want to say that you were ever on her, but you think you may have been?

A. Yes, sir. I could not state under oath I had ever been aboard of the "Dauntless" previous to the date we are talking of.

Q. Previous to the time of the collision?

A. Yes, sir. I could not state under oath I was ever aboard of her.

Q. When, if at all, did you make an examination of the "Weber"?

A. The first examination of the "Weber" that I made was before we purchased her.

Q. Before you purchased her?

A. Yes, sir.

Q. When was that?

A. I think it was a year ago. I think it was in March, 1905.

Q. Do you know what repairs had been made to the "Weber" shortly prior to that time?

A. Yes, sir.

Q. She had been fixed up?

(Testimony of Alfred E. Anderson.)

A. What repairs had been made to her previous to that time?

Q. Yes.

A. To the time that I purchased her?

Q. Yes.

A. No, sir; I cannot say that I know of any repairs—general repairs. You are speaking of repairs to the hull, or to any part of the vessel?

Q. Yes, to any portion of her.

A. It was stated by the Union Transportation Company officials, when we made the purchase, that they had made certain recent repairs to the "Weber" in connection with the machinery, more so than in connection with the hull.

Q. The machinery is a part of the vessel?

A. The machinery is a part of the vessel.

Q. It is a factor in the value of the vessel?

A. Yes, sir.

Q. A very important factor, is it not?

A. Yes, sir.

Q. Your company had been in negotiations for the purchase of the "Weber" and "Columbia" from the Union Transportation Company, had you not?

A. Yes, sir.

Q. You do not know that the "Dauntless" at the time she was sunk was in the same condition as the "Weber" was at the time you purchased her?

A. I do not.

Q. What do you figure as depreciation on the value of a vessel each year she is in service?

(Testimony of Alfred E. Anderson.)

A. That is a matter of opinion. Some think five per cent, and some think six per cent. It is very hard to arrive at the value of a vessel by reason of the age, because of the other great factor, the condition of the vessel. The condition that the vessel is maintained in always has to be taken into consideration in estimating the value of a vessel.

Q. When Mr. Frank asked you the question, your answer was asking "how old was the 'Dauntless.'" What was the reason of that question by you?

A. Having those two points in my mind, the age the vessel was, and knowing the age, it would then be impossible for me to give any estimate of the value—it would not be impossible, but it would be not possible to give a definite value or opinion unless I knew as well the condition of the vessel, but I would not assume that a vessel had deteriorated very much in nine years. I would not think so, not if it was well constructed.

Q. When your company bought the "Columbia" and the "Weber," you bought the business of the Union Transportation Company, didn't you?

A. We bought the property and business and goodwill.

Q. What was the "Weber" taken in at in that purchase—the value of the "Weber"?

Mr. FRANK.—I object to that as incompetent and immaterial, not being any basis for the valuation of the other vessel, having been bought as a part of a general purchase, to purchase the entire business of

(Testimony of Alfred E. Anderson.)

the Union Transportation Company which was going out of business, and further, it does not appear what the condition of the "Weber" was at the time of the purchase, as compared with the condition of the "Dauntless" at the time she was sunk.

A. Why, we did not segregate the value of the "Weber" from the value of the "Columbia," or any other interests that we acquired. It was just a lump sum, a sum of $50,000, it was generally understood that we paid for the purchase of the property, business and goodwill of the Union Transportation Company.

Mr. LEVINSKY.—Q. That included the steamers "Weber" and "Columbia"? A. Yes, sir.

Q. And the goodwill of the business?

A. Yes, sir.

Q. That company has been engaged in the transportation of freight and passengers between Stockton and San Francisco for some ten years?

A. I think at least that.

Q. And they had an established business?

A. Yes, sir.

Q. What other property did you have in the way of property, boats, or anything in that nature other than the two steamers and the goodwill?

A. Did they have?

Q. Yes. A. None other.

Q. You say it was generally understood that was the price paid?

A. Yes, that was the price paid.

(Testimony of Alfred E. Anderson.)

Q. Was it a less figure?

A. No, sir, that was the price.

Q. Was that paid in cash?

A. Yes, sir, it was paid in cash.

Q. It had nothing to do with the stock of the concern. They did not subscribe for any stock in the concern? A. In my corporation?

Q. Yes. A. No, sir.

Q. The "Columbia" was a more expensive vessel than the "Weber," was she not?

A. What do you mean by "a more expensive vessel"?

Q. To construct? A. To construct?

Q. Yes.

A. The "Columbia" was a very very poorly constructed vessel.

Q. She was a larger vessel?

A. She was a larger vessel, yes.

Q. Had not the Union Transportation Company been attempting to dispose of its property to others at the time that your company purchased it?

Mr. FRANK.—I do not want to make individual objections, but this line of examination, I consider, is immaterial; what happened eight or nine years after in the sale of a failing and going out of business property is a very different proposition. It does not fix the value of another vessel during the time the company was engaged in business.

A. Why, I could not say I have—no definite knowledge.

(Testimony of Alfred E. Anderson.)

Mr. LEVINSKY.—Q. In your estimate, did you make any allowance for depreciation in the value of the "Dauntless" from the time she was built to the time of the collision?

A. Did I allow any in my mind?

Q. Yes.

A. In that price that I fixed upon her?

Q. Yes. A. Yes, sir.

Q. How much?

A. About $10,000 I think, at least.

Q. How much allowance for depreciation do you make in the value of the "Weber"?

A. How much depreciation?

Q. Yes.

A. Would I make in the value of the "Weber"?

Q. Did you make in the value of the "Weber"?

A. Well, that might be better answered by stating how much money I spent on her, I suppose.

Q. I ask you, at the time that you purchased her, did you take into consideration the depreciation?

A. I estimated in my mind, when we purchased the "Weber," what amount of money I would have to expend on her to put her in a first-class condition.

Q. You do not know personally whether the condition of the "Dauntless" was as good as the condition of the "Weber" or not at the time she sunk?

A. I don't know anything about the condition of the "Dauntless" at the time she sunk.

Q. Do you know what the "Dauntless" cost, of your own knowledge?

(Testimony of Alfred E. Anderson.)

A. I do not, only from rumor.

Q. In books of your corporation, do you write off each year the depreciation of a vessel?

A. We do not off of each vessel—every vessel. We write off a depreciation every year on certain of the property, but not from every vessel.

Q. That is based on its condition at that time?

A. Entirely on its condition. We have some steamers that are quite old as to years, but as we have expended such large sums of money on them, they are practically new.

Q. You are compelled to expend those large sums of money by reason of wear and tear and depreciation of the vessel? A. Yes, sir.

Q. Is that depreciation that you write off each year arbitrary, or just based on what the company thinks?

A. It is generally left to the management to determine in its mind the values of the different properties every year.

Q. Does the management consist of your father and yourself?

A. I am the management at the present time, of course, governed by a board of directors. My father has been dead two years.

Q. Then the value you fix is based entirely on assumption? A. Yes, sir.

Redirect Examination.

Mr. FRANK.—Q. Mr. Anderson, what was the construction of the "Weber" and the "Dauntless" as

(Testimony of Alfred E. Anderson.)

compared with other steamers? Was there anything peculiar about the construction of the hulls?

A. The construction of the "Weber"?

Q. Yes.

Mr. LEVINSKY.—The "Weber" and the "Dauntless."

Mr. FRANK.—Q. Assuming they are sister ships?

A. They were constructed differently than most of the type of stern-wheel boats on the bay. They are what are called molded hulls, molded frames.

Q. Is that a better or poorer construction than the ordinary construction?

A. In many ways it is better. It has a disadvantage as well as advantage. It makes a vessel a deeper draught; then she is not as good for shallow water as an entirely flat model would be.

Q. Taking the advantages and disadvantages, one in conjunction with the other, of such a mold, does it decrease or increase the value of a vessel?

A. In my judgment?

Q. Yes.

A. Well, I would prefer to have a steamer constructed of molded hull to one of another construction.

Q. Is it more expensive or less expensive in construction?

A. It is more expensive to construct.

Q. When you say that the values are based on assumption, or rather, when you say yes to the question

(Testimony of Alfred E. Anderson.)
of counsel on the other side, do I understand you by that to mean that it is not based on your experience and knowledge in the business?

A. No, sir. Assuming that the vessel was in good condition, sound condition, as you frame the question.

Q. Taking the question that was put to you, that she was in sound condition at the time she was sunk, and between 9 and 10 years old, that is what you mean by assumption? A. Yes, sir.

Q. Based on that, taking your knowledge and experience in the business into consideration, that is on what you base the valuation? A. Exactly.

Q. As I understand you, if a vessel is maintained in good condition, there is not, if any, depreciation in value on account of her age?

A. I did state, Mr. Frank, that I had in mind a depreciation of at least $10,000 in the value of that steamer—at least $10,000—and then assuming that the vessel was in good repair, the hull and all kept in good condition and sound.

Q. When did you purchase the "Weber"?

A. March, 1905.

Q. At that time was the Union Transportation Company going out of business?

Mr. LEVINSKY.—You ought to know that yourself.

Mr. FRANK.—I suppose I ought to. If you will allow me to testify, I will; otherwise, I will ask the witness.

A. That was the understanding, that they would go out of business.

(Testimony of Alfred E. Anderson.)

Q. Did they dispose of everything they had?

A. Yes, sir, their property, business and goodwill.

Q. You said you made repairs on the "Weber." To what extent?

Mr. LEVINSKY.—Objected to as irrelevant, immaterial and incompetent, as being a matter a number of years afterwards, and the repairs that were made on the "Weber" have nothing to do with this matter.

Mr. FRANK.—I think so myself, except for your questions upon the same proposition, and if you consent to have your evidence on that subject stricken out, I will withdraw the question.

Mr. LEVINSKY.—You have a sarcastic way of trying to try a case that does not please me.

Mr. FRANK.—Then I do not please you?

Q. Answer the question, Mr. Anderson.

A. What was the question?

Q. Read the question, Mr. Reporter.

(The Reporter reads the previous question.)

A. As nearly as I can remember, between $30,000 and $35,000.

Q. Did I understand you to say that the "Columbia" was a poorly constructed vessel?

A. Yes, sir, very poorly constructed, of hardly any value.

Q. Of hardly any value at all?

A. Of hardly any value at all.

Q. Was there anything much to the goodwill of the Union Transportation Company at that time?

(Testimony of Alfred E. Anderson.)

A. I did not have in mind paying anything for their goodwill or for their business. It was my opinion that everybody must build up their own business and make their own goodwill.

Q. As a matter of fact, when you purchased the "Weber" and the "Columbia," and the business of the Union Transportation Company, and paid $50,000 for it, practically, you paid that sum for the "Weber"?

Mr. LEVINSKY.—That is very leading.

A. Oh, no.

Mr. FRANK.—Q. At any rate, all that there was was the "Columbia" and the "Weber" and the goodwill?

A. Yes, sir.

Q. You did not consider the goodwill of any value; is that right?

A. It is of some value. I did not consider it of any value. As Mrs. Gillis recollects, as we talked matters over, I could not agree to entertain any price in my mind for the goodwill or for the business.

Q. So that is eliminated from the $50,000 that you paid for it?

A. The $50,000 was practically, in my mind, for the two vessels.

Q. The "Columbia" you considered of scarcely any value at all?

A. When I say of scarcely any value, in comparison to what the vessel had cost, what had been expended on her. I had the value of the "Columbia"

(Testimony of Alfred E. Anderson.)

in my mind, which all developed later in wrecking the vessel and taking out the machinery.

Q. What was the value in your mind of the "Columbia"? A. About $10,000.

Recross-examination.

Mr. LEVINSKY.—Q. Mr. Anderson, do you know the steamer "H. J. Corcoran"?

A. Yes, sir.

Q. Did you know her when she was the property of the California Navigation and Improvement company? A. Yes, sir.

Q. Do you know the price she sold for, when she was sold to the Peiper-Aden people?

A. Only from rumor.

Q. That vessel had been in operation five years and she sold for $27,500.

Mr. FRANK.—I object to that, and move that it be stricken out.

Mr. LEVINSKY.—I am asking the question of the witness.

Q. Assuming that that vessel cost $87,000, do you take that depreciation into consideration in fixing any value here to-day?

A. Would I take that price in fixing a value on the "Corcoran" today?

Mr. FRANK.—No, on other values.

Mr. LEVINSKY.—Q. Values that you fix to-day?

Mr. FRANK.—The witness testified that he does not know what she sold for. The witness has testi-

(Testimony of Alfred E. Anderson.)

fied that he fixes the value on his own experience and his own vessels.

Mr. LEVINSKY.—Q. Would you take that into consideration in fixing the value today on the "Dauntless"?

A. No, sir. Every vessel, in my mind, must be treated as an individual piece of property, having in mind its usefulness and its ability to create money—its usefulness, that is the matter entirely.

Q. You mean by that, that a vessel, if it goes with the business, would be worth more than if it did not go with the business?

A. A vessel that is a practical vessel for a certain business has certainly more value than a vessel that is of no practical use.

Q. Do you know of any vessel that ever sold for what it cost after being run some years?

A. No, sir, I cannot say that I do—yes, with one exception. I think I bought a vessel for all she ever cost.

Q. Mr. Anderson, the cost of repairing vessels, and the value of vessels in 1905, was more than it was in 1901?

A. The cost was more in 1905 than it was in 1901?

Q. Yes. A. Slightly, yes.

Q. I mean the value of the vessel?

A. Well, the value of the vessel would be in advance in 1905 to the value in 1901, to that extent, that the increased cost of reduction would be, in my mind.

Q. About what percentage was that increase of cost of production?

(Testimony of Alfred E. Anderson.)

A. I have not familiarized myself or made reference to any comparisons in our business over those few years, so that it would be difficult for me to state just what the ratio was.

Q. Could you approximate it?

A. Hardly, without referring to records and ascertaining just what our increased cost for labor and material was. There is a graduating scale of wages and material, and so on, and it fluctuates from year to year. We have not arrived at the present excessive cost of production at just one leap and a bound. It has been a gradual rise.

Q. You stated it was more expensive to construct a vessel in 1905 than it was in 1901?

A. Yes, sir. I have in mind a steamer that we built, I think, in 1901, and in reviewing in a general way in my mind the cost of labor and material at that time, as compared with 1905, it is more.

Q. Could you give the per cent?

A. Just what per cent it was, I could tell by reference to my records, but I have it not in my mind.

Q. On a $50,000 vessel, we will say?

A. On a $50,000 vessel, at least ten per cent.

Q. As much as twenty per cent?

A. It might be as much as twenty per cent I think at least ten per cent, and counsel suggests it might be twenty per cent. It might be twenty per cent.

Further Redirect Examination.

Mr. FRANK.—Q. You are not prepared to say it was twenty per cent?

(Testimony of Alfred E. Anderson.)

A. I am not prepared to state, without looking up my records. The price of the increased cost of labor does not always keep pace with the increased cost of material. Sometimes we have labor comparatively high, and material comparatively low.

Q. But your best judgment is that it would not be much in excess of ten per cent, without trying to be accurate about it?

Mr. EELLS.—He did not say that. You are putting words into his mouth, Mr. Frank. He is not an unwilling witness for you.

Mr. FRANK.—I will change the form of the question.

Q. What is your best judgment?

A. I would not want to offer an opinion that it was more than 10 per cent; it might be. I think it is at least 10 per cent. That was from 1901 to 1905. From 1905 to the present time, we are not considering.

Q. You were asked concerning the "H. J. Corcoran." State whether or not the "Corcoran" was a failure for the purpose of trade and business on this bay, as a stern-wheeler?

A. It is generally understood that the "H. J. Corcoran" was a failure in every line of trade that she plied in.

Q. What was that due to—anything peculiar to that vessel?

A. Yes, sir. She was a very elegant vessel in the matter of passenger appointments and accommoda-

(Testimony of Mrs. Sarah H. Gillis.)

tions, but with very meager accommodations for freight.

Q. She made a very good dining-room after the fire?

A. Yes, sir, we all thought so—like an oasis in the desert.

[Testimony of Mrs. Sarah H. Gillis, for Claimant.]

Mrs. SARAH H. GILLIS, called for the claimant, Union Transportation Company, sworn.

Mr. FRANK.—Q. You were the wife of the late James Gillis?

A. Yes, sir.

Q. He is deceased since this case was tried?

A. Yes, sir.

Q. Yes, sir, since the sale of the boats.

Q. When did he die?

A. The 2d of July, 1904.

Q. Did you have anything to do with the business of the Union Transportation Company during the life of your husband?

A. I was Mr. Gillis' associate in the business of the company, not part of the company, but in business with them.

Q. As such associate, what, if any, familiarity did you have with the various business transactions of your husband, connected with the steamer "Dauntless"?

A. I examined all the papers and accounted for the money, and wrote a great many business letters.

(Testimony of Mrs. Sarah H. Gillis.)

I accounted for the money that I handled. I gave an account to the company of the company's money that I used for the company.

Q. Did you have anything to do with the "Dauntless" after she was sunk and the time of her raising?

A. I lived on the wreck 11 weeks. I lived on the steamer "McDowell" 11 weeks—the "McDonald" or the "McDowell"—the "McDonald," I think.

Q. During that time, what, if any, connection did you have with the operation of raising it and the expense attending it?

A. I looked after the details of business that Mr. Gillis asked me to. I did a great deal of soliciting, and looked out for any errands or business that he might send me to the city for—various business.

Q. Did you, at that time, by your connection there, gain any knowledge as to the cost and expense of raising the "Dauntless"?

A. I saw the memorandum of the accounts. I looked over the papers and discussed them with my husband.

Q. Do you know what it cost to raise the "Dauntless"? A. It cost $5,500.

Mr. EELLS.—I move to strike that out as not responsive to the question.

Mr. FRANK.—It is practically the same thing.

Q. At the time that the "Weber" and the "Dauntless" were built, did you then have the same relations to the business of your husband as you did subsequently?

(Testimony of Mrs. Sarah H. Gillis.)

A. Not the same. I discussed the price of material and the building of the boats, and visited the construction of the boats, when they were built, and the machinery. I looked into all of it with my husband. I suppose I knew the number of bolts in every boiler at the time.

Q. With respect to the two vessels being built on the same plans and specifications and being sister vessels, what can you say?

A. They were similar; they were built alike. The hulls were built of cedar and selected wood. The builder was a particular friend of Mr. Gillis,' and he built them of the most expensive and best material.

Q. I want to know whether they were built on the same plans and specifications and were identically the same vessels?

A. Yes, sir, they were the same vessels.

Q. After the "Dauntless" was sunk, do you know what, if any, efforts Mr. Gillis took to have the California Navigation and Improvement Company raise and repair the "Dauntless"?

A. Yes, sir. He—

Mr. LEVINSKY.—(Intg.) If the witness knows of her own knowledge.

A. (Contg.) He asked them to raise the vessel.

Mr. LEVINSKY.—I object unless the witness knows of her own knowledge.

Mr. FRANK.—If she does not know of her own knowledge, you can get that out on cross-examination. I assume she does. She says she was his busi-

(Testimony of Mrs. Sarah H. Gillis.)

ness associate and was present with him at the raising and taking care of it.

The COMMISSIONER.—Q. Do you know it of your own knowledge?

A. I wrote the letters for Mr. Gillis. The construction of the—

Q. That is not the question?

Mr. FRANK.—That is pertinent.

Q. Do I understand you to say that you wrote the letter making the request. A. Yes, sir.

Q. What was the nature of the request?

Mr. EELLS.—I object. The letters are the best evidence.

Mr. FRANK.—Q. Have you preserved those letters, Mrs. Gillis? A. No, sir, I have not.

Q. Go on?

Mr. EELLS.—I object. No request has been made on us to produce it. We object to any testimony made six years after the event as to the contents of any letter whatever unless it appears that the letter is lost.

Mr. FRANK.—That is a new objection. However, let it go in for what it is worth.

A. The Navigation Line was informed that their steamer the "Mary Garrett" had sunk the "Dauntless"; that Mr. Gillis was powerless, that he had no equipment to raise the vessel, and he asked the Navigation Line to come to the rescue of the vessel.

Q. What, if any, reply did they make?

A. They made no reply whatever.

(Testimony of Mrs. Sarah H. Gillis.)

Q. After the "Dauntless" was raised, Mrs. Gillis, was any offer made to the California Navigation and Improvement Company with respect to the repair or disposal of the wreck?

Mr. LEVINSKY.—I object, unless she knows of her own personal knowledge.

Mr. FRANK.—Q. Say yes or no?

A. Yes, sir.

Q. Now, how and by whom was that communication made?

Mr. LEVINSKY.—I think a legal proposition is involved there.

A. I do not quite understand you, Mr. Frank.

Mr. FRANK.—Read the question, Mr. Reporter.

(The Reporter reads the previous question.)

A. Yes, sir. Mr. Gillis went to the California Navigation and Improvement Company—

Mr. LEVINSKY.—I object. The witness testifies now that Mr. Gillis went, showing she could not have any personal knowledge.

The WITNESS.—Let me tell you what the personal knowledge was.

Mr. FRANK.—Q. Go on, Mrs. Gillis.

A. Mr. Gillis went to the board and said, "Gentlemen"—

The COMMISSIONER.—Q. Were you present?

Mr. FRANK.—Let her finish.

The COMMISSIONER.—Q. Were you present, Mrs. Gillis?

A. The President of the Company told me what Mr. Gillis said.

(Testimony of Mrs. Sarah H. Gillis.)

The COMMISSIONER.—You cannot testify to that. That is hearsay.

Mr. FRANK.—She can testify to that.

The COMMISSIONER.—Excuse me. Thare has been a great deal of testimony gone in here. Of course, this is an investigation to find out the value of that ship. In doing so, I would admit most any testimony that would throw any light upon it whatever. I think you have both gone very far afield, but a witness cannot testify from hearsay.

Mr. FRANK.—It is not hearsay.

The COMMISSIONER.—She said so.

Mr. FRANK.—The admissions of the President of the Company are admissible.

The COMMISSIONER.—She cannot testify to hearsay evidence.

Mr. FRANK.—We will submit the testimony. If you do not agree with us, perhaps the Court will. It is an elementary rule of law that the admission of a party, as testimony, is competent. If the President of that corporation so stated, it is admissible.

Mr. EELLS.—Let her state what the President of that corporation said. Do not let her testify in this narrative form.

Mr. FRANK.—Q. What, if anything, did the President of the Navigation Company tell you concerning the offer made by Mr. Gillis with respect to the repair, or taking of the wreck?

Mr. EELLS.—I object to the question unless it embodies when and where the conversation was had, and

(Testimony of Mrs. Sarah H. Gillis.)

who was the person referred to as the President of the Company.

Mr. FRANK.—She can only answer one at a time.

Mr. EELLS.—You are asking what he told her, and that question is objected to.

Mr. FRANK.—Let us start over again.

Q. Who was the President of the California Navigation and Improvement Company at that time?

A. At the time of this conversation, Mr. Newell—Mr. Sidney Newell was President of the Company. I was on board of his steamer—on board of the "J. D. Peters." He was on board of this vessel at the same time.

Q. State what, if anything, he said to you with respect to the offer—

Mr. EELLS.—We object to what he may have said at that time or any time as being hearsay, and not binding the corporation.

Mr. FRANK.—Q. With respect to the offer made by Mr. Gillis of the wreck of the "Dauntless" and the request for her repair?

A. He related to me that Mr. Gillis had come to him—

Mr. EELLS.—Do you pass upon these objections, Mr. Commissioner?

The COMMISSIONER.—Yes, if any objections are made.

Mr. EELLS.—I urge that objection strongly. The witness is now detailing a statement which occurred long after the event, from the President of the corporation, in which he is represented as having made

(Testimony of Mrs. Sarah H. Gillis.)

some statement or other regarding a conversation had with Mr. Gillis some time before that. I say that is not evidence against the corporation in any way. He had no authority to make such statements for us.

The COMMISSIONER.—I understand that Mr. Newell said something to Mrs. Gillis about the cost of repair. I think she can testify to what that was.

Mr. EELLS.—If we have any guide from the question, it is that Mr. Newell said something to Mrs. Gillis about what Mr. Gillis said to him and the Board of Directors some time previous.

The COMMISSIONER.—No. It is what Mr. Newell said to Mr. Gillis as to the cost of the repair, and she can answer that.

Mr. FRANK.—Q. Answer the question, Mrs. Gillis. Read the question to the witness, Mr. Reporter.

(The Reporter reads the previous question.)

A. He said that he ignored Mr. Gillis; that his request was without any consideration from himself or his company.

Mr. FRANK.—Q. Did he state what the request was?

A. The request was that Mr. Gillis offered the Navigation Line the wreck to repair, to put in place as it was destroyed, or to pay him for the wreck.

Q. Returning to the value of the *value*. Do you know what the original cost of the vessel was?

A. $51,000.

(Testimony of Mrs. Sarah H. Gillis.)

Q. Subsequent to that, was there anything added to the vessel? A. The Texas deck, $15,000.

Mr. LEVINSKY.—I move to strike out the last part of the answer, the value, because there was no question involved.

Mr. FRANK.—Very well.

Q. What was the increased expense for the Texas deck?

Mr. LEVINSKY.—We object, unless the witness knows of her own personal knowledge.

A. I know that from the accounts of the company, and discussing it.

Mr. FRANK.—Q. How much?

A. $15,000.

Q. The furnishings in addition to that?

A. I could not state that. I would not be competent to state that.

Q. These figures that you have given, then, are exclusive of the furnishings of the vessel?

A. Yes, sir.

The COMMISSIONER.—What do you mean by the furnishings?

Mr. FRANK.—Beds, bedding, piano, stores, kitchen utensils, and general outfitting of a steamer, outside of the bare vessel.

Q. Do you know whether or not the vessel was well and thoroughly outfitted?

Mr. LEVINSKY.—We object to these questions as absolutely leading.

A. Yes, sir, I know that it was perfectly equipped.

(Testimony of Mrs. Sarah H. Gillis.)

Mr. FRANK.—Q. What, if anything, was its condition in regard to such equipment at the time she was sunk?

A. In perfect working order; in full capacity for doing business; in every department—perfect.

Cross-examination.

Mr. EELLS.—Q. Did you have any connection with the company, Mrs. Gillis, excepting being the wife of Mr. Gillis?

A. I was a stockholder in the company.

Q. You were not an official in any way of the company? A. At that time?

Q. At the time the vessel was lost?

A. Not an official. What do you mean.

Q. I ask you, if you were an official of the company at the time the vessel was lost?

A. I was a stockholder in the company, and I obeyed the requests of Mr. Gillis in regard to attending to the business of the company.

Mr. FRANK.—By "official" I understand you to mean President or Secretary of the company, or do you mean an employee of the steamer, which?

Mr. EELLS.—I want to find out if she had any business relation whatever to the company except as a stockholder.

The WITNESS.—I was not an employee of the company, and my husband was not. He did business as the President of the company without salary, and I did business with him without a salary. They gave me a detail of his business, and they asked me to assist him, which I did.

(Testimony of Mrs. Sarah H. Gillis.)

Mr. EELLS.—Q. You were naturally interested, as his wife, in these enterprises. I asked you if you were any special relation to the company other than that. As Mr. Gillis' wife you were familiar with his affairs as far as possible, under those conditions?

Mr. FRANK.—Q. State what your relations were, how you transacted his business, and what you did for him?

A. I did the buying. I took charge of the stewards' department on the three boats. I bought all the steward's supplies, everything that belonged to that department. I gave an account monthly to the company of my expenditures for every department that I supplied. That was at Mr. Gillis' request. He was embarrassed with an over-amount of business and he asked me to take the position of assistant to himself, which I tried to do.

Mr. EELLS.—Q. There are other stockholders besides Mr. Gillis and yourself in the company?

A. Yes, sir.

Q. When you speak of the cost of this vessel being $51,000, did that include any equipment whatever?

A. That included the boat, the steamer, without any epuipment; without the supplies; without the steward's department being considered, or the furnishing of the cabins or rooms. That included the building of the steamer ready for use.

Q. It could not be used without being equipped, could it?

(Testimony of Mrs. Sarah H. Gillis.)

A. The equipment was the machinery and the sailing possibilities of the vessel. The vessel was taken to San Francisco from the shipyard and equipped at San Francisco, at the dock, with the furnishings, but she must get up steam before she could be tried on the bay, to know if the boat was perfect.

Q. When you say $51,000, I want to know if that included her equipment in any fashion, or her furnishings in any fashion?

A. No, sir, it did not.

Q. Nothing at all? A. No, sir.

Q. You do not know how much that cost?

A. I was not asked to furnish that boat. Mr. Gillis had a man who managed that boat before I took any part in the boat. I frequently visited the boat while under construction and acquainted myself with it in that way.

Q. You were not asked to build the boat, but you know how much it cost to build. Why don't you know how much it cost to furnish it?

A. I might answer that question, if I had a little more time to look it up.

Q. You have looked up the question of the $51,000, have you?

A. No, I have not looked at a paper at all. I know it from inquiry, asking questions about the cost of the construction all along.

Q. You were greatly interested in that vessel?

A. Not particularly in that vessel more than the other two.

(Testimony of Mrs. Sarah H. Gillis.)

Q. You were interested in the "Weber" that was being built at the same time?

A. Yes, sir.

Q. You watched her constantly in the course of construction? A. I did not say that.

Q. Did you not say you frequently went there and knew how many rivets there were in the boilers?

A. I said I might be, because I heard it discussed so much between the builder and Mr. Gillis.

Q. When you spoke about knowing every rivet in her boilers, you referred to what had been told you, and not what you had seen?

A. The builder of the vessel was very solicitous and very desirous of pleasing Mr. Gillis. He often asked me to look at the works, and told me the value and strength of the vessel, and told me he was building the best boat on the bay.

Q. Were you not at all interested in the way she was furnished?

A. Yes, sir. But I was ill at the time she was furnished.

The COMMISSIONER.—Q. Who built the boat?

A. It was built at the Fulton Iron Works. Mr. Spear, Senior, was the man who built it. I often visited the works, at his invitation, to look at the boats.

Mr. EELLS.—Q. You said some man furnished the boat. Who was that. Do you know who furnished the boat—fitted her out?

A. The "Columbia"?

Q. No, the "Dauntless"?

(Testimony of Mrs. Sarah H. Gillis.)

A. Later I bought the linen goods, and refitted the cabins, and did those things later on the "Weber."

Q. Do you know who did it on the "Dauntless"?

A. Yes, sir, I furnished a great many articles for the "Dauntless."

Mr. FRANK.—The question is, who originally furnished the "Dauntless," whether you did, or some one else.

A. I had nothing to do with the "Dauntless" in the original furnishing.

Mr. EELLS.—Q. Was she built under contract?

A. Under contract?

Q. Yes. A. Well partially.

Q. Was she not entirely built under contract?

A. I cannot answer you that.

Q. How do you know what she cost?

A. I had access to the books, and discussed the cost of the boat, and objected to steam boats in general, because I did not want my husband to be in the steamboat business.

Q. You have not testified from your recollection of the books?

A. From the discussion with my husband and of the cost of steamboats, and the general talk of steamboat men to me in regard to purchasing the property.

Q. You mean by that, that the general talk of steamboat men and of your husband is the source of your knowledge as to the cost of the "Dauntless"?

A. I do not say that. I had access to the books, and saw the account of the material, that is, my knowledge is what I saw of the boat.

(Testimony of Mrs. Sarah H. Gillis.)

Q. Where are the books which you had access to, from which you learned that she cost $51,000?

A. When I was requested by the attorneys to place the books of the company in their hands, I placed the records in the hands of Mr. Frank, the vouchers and the books. I sent a man with the books—Mr. McKee from Stockton—with the accounts and books to Mr. Frank.

Q. Were those all the books of the company from the time that the company was formed?

A. We have the minutes of the meetings and various books. The books pertaining particularly to the "Dauntless" were placed in the hands of Mr. Frank.

Q. Including the books of her building, as well as the equipment?

A. I think it was. I have no accounts. They were placed in Mr. Frank's hands.

Q. You do not know whether she was built under contract, or whether she was built by day work?

A. It was both contract and day work. The plan of building it strong and changing it made it a more expensive boat than the contract. Mr. Gillis insisted on having the best material possible put in the boat.

Q. You have been told that the vessel cost $51,000.

A. I have seen it. I have seen the figures. If the figures are any evidence, I have seen the figures—talked them over and looked at them.

Q. How do you know that did not include the furnishings?

(Testimony of Mrs. Sarah H. Gillis.)

A. I am not saying I know anything about the furnishings. I took no account of the furnishings. They were furnished by some men that chose to furnish them in their own way. I did not ask any questions about that. The furnishings did not interest me.

Q. What was the difference in cost between the "Dauntless" and the "Weber"?

A. Similar boats, built the same.

Q. Built at the same time? A. Yes, sir.

Q. Built under the same contract?

A. Built under the same conditions—the two boats were.

Q. Were they delivered at the same time?

A. No, sir.

Q. Not delivered at the same time?

A. No, sir.

Q. Which was delivered first?

A. I think the "Dauntless" was the first boat that came out.

Q. Were the payments made on both boats, or separate payments on each boat?

A. Payments were made as the boats were present.

Q. To whom were the payments made of this $51,000?

A. They were made to the Fulton Iron Works.

Q. All of the $51,000?

A. No, sir, not all the $51,000.

Q. How much of the $51,000 was paid to the Fulton Iron Works for the "Dauntless"?

(Testimony of Mrs. Sarah H. Gillis.)

A. I am not prepared to say that. My book accounts are not present, and I could not state how much money and what checks were paid to the Fulton Iron Works.

Q. The Fulton Iron Works built the vessels, did they not? A. Yes, sir.

Q. To whom else was any part of the $51,000 paid, if not to the Fulton Iron Works?

A. The builder of the boat, Captain Marcucci, the constructor of the boats, and his price for building the boats I am not able to say. He was daily superintending the building of the hull of the boats, and he many times explained to me the selected wood and the value of the cedar hulls of those boats.

Q. The boats were built by the Fulton Iron Works and not Marcucci?

A. The hulls were built by Captain Marcucci, and the Fulton Iron Works furnished the machinery.

Q. Where were they built?

A. At the Fulton Iron Works.

Q. Were they not built by them?

A. I am not able to tell you the details of that. I did not ask that as much as I discussed the cost of building the boats.

Q. You have testified that the "Weber" and the "Dauntless" cost exactly the same sum, $51,000 each?

A. As nearly as I am able to state, without having the figures before me. That is what we discussed always, that they were sister boats and were built alike.

(Testimony of Mrs. Sarah H. Gillis.)

Q. Which are you testifying from, your figures that you say you consulted, or the conversation you had with steamboat men and Mr. Gillis?

A. Both.

Q. Do they agree?

A. As nearly as I can remember.

Q. You did not have sufficient information to know whether the ships were built under contract or not, or to whom this money was paid?

A. Naturally, it would be paid to the builder of the boat, the Fulton Iron Works. They were constructed at the Fulton Iron Works. They were paid for as they asked for the money.

Q. Are you prepared to say that none of the fixtures or furnishings on board of the boats were included in that payment?

A. I should have to post myself a little bit before I answered that question.

Q. I want to know whether you say they were not included?

A. I will not say that until I look up the matter. I can answer you that question when I look up the matter.

Q. Where will you go to look up the matter?

A. I will look that up and bring evidence of where I find it when I do answer the question.

Q. Have you the books?

A. I might have some memorandums that I have taken of the affairs, and I may have none.

Q. Have you, in fact, any memorandums?

(Testimony of Mrs. Sarah H. Gillis.)

A. I will answer you, that when I look at my memorandums—I have a great many books and papers that pertain, in scraps, to the business of the company that were not in such bookkeeping order. I may possibly come across some of those figures.

Q. Until then, you are not prepared to say that this money that was spent was not the sum which covered all the outfitting and furnishing of the boat?

A. I am not prepared to say that.

Q. When was this conversation that you had with Mr. Newell?

A. I could not give you the date of that. I have been on the "J. D. Peters" twice in the last four years. Mr. Newell was a traveller at the same time. I sought an interview with him. I talked over the affairs of our company with him. It was a social talk that we had, and he related the conversation of Mr. Gillis to me, which I had known from Mr. Gillis.

Q. We will get along faster, Mrs. Gillis, if you will confine yourself to answering my questions, when I ask them. Read the question, Mr. Reporter.

(The Reporter reads the previous question.)

A. I cannot give the date of the conversation.

Q. How long after the accident to the "Dauntless"?

A. This conversation was since the death of Mr. Gillis.

Q. Within the last year?

A. No, sir; within the last two years.

Q. You have testified you were on the "Dauntless" for 11 weeks, was it?

(Testimony of Mrs. Sarah H. Gillis.)

A. I was at the wreck of the "Dauntless."

Q. What vessels were there then employed in raising her?

A. Two barges, and the steamer "McDonald" was there.

Q. To whom did the steamer "McDonald" belong?

A. To the Navigation and Improvement Company.

Q. The California Navigation and Improvement Company, the owner of the "Mary Garrett"?

A. Yes, sir.

Q. Was she engaged in the work of raising her?

A. She was engaged in the work of raising the "Dauntless."

Q. Was she under the orders of Mr. Gillis?

A. Yes, sir.

Q. She was manned by a crew of the California Navigation and Improvement Company?

A. Yes, sir.

Q. In fact, they did assist in raising the "Dauntless," did they?

A. They furnished the equipment.

Q. Was that equipment ever paid for by Mr. Gillis or his company? A. No, sir.

Q. Who superintended the efforts of raising the "Dauntless"? A. Mr. Gillis.

Q. Do you remember the fact that Mr. T. P. H. Whitelaw visited that wreck soon after the accident?

A. I remember that.

Q. Were you present at any conversation?

(Testimony of Mrs. Sarah H. Gillis.)

A. I was not present, but I remember the account given me by Mr. Gillis of his visit.

Q. You remember the fact that he was there?

A. I was not there at the time, but Mr. Gillis told me that he visited the wreck at Mr. Gillis' request.

Q. You, however, were not present at any interview? A. No, sir, I was not present.

Q. Who furnished those barges?

A. The California Navigation Company.

Q. The California Navigation and Improvement Company? A. Yes, sir.

Q. Did they furnish everything that was used by Mr. Gillis for the purpose of salving that boat?

A. No, sir.

Q. What did he furnish?

A. He furnished men and materials to raise the "Dauntless."

Q. What material?

A Cables and piles and timber.

Mr. EELLS.—That is all.

Mr. FRANK.—That is our case.

(A recess was here taken until 1:30 P. M.)

AFTERNOON SESSION.

Mr. LEVINSKY.—I should like to ask a question or two of Mrs. Gillis.

Mrs. SARAH H. GILLIS, recalled for further cross-examination.

Mr. LEVINSKY.—Q. How long from the time of the collision was it until the "Dauntless" was raised and brought to Stockton?

(Testimony of Mrs. Sarah H. Gillis.)

A. I have not a memorandum of that.

Q. Answer my question, how long was it?

A. I don't know.

Q. About how long? A. I don't know.

Q. About four months, was it not?

A. I don't know.

Q. You were there 11 weeks? A. Yes, sir.

Q. How long after you left was it before she came to Stockton?

A. After I left. I stayed there until she came.

Q. When did you go down? How long after that?

A. I went down there the last of October.

Q. The last of October of 1901?

A. Yes, sir.

Q. Did your husband, Mr. Gillis, have any experience in raising vessels?

A. Did he have experience?

Q. Yes. A. Yes, sir.

Q. Prior to this time? A. Yes, sir.

Q. What experience did he have?

A. They had accidents on the river, and you know that he raised the "Weber" that was sunk by holes being bored in the bottom. They raised that boat.

Q. Was she sunk? A. Yes, sir.

Q. When was this?

A. That was in the early history of our line, in Stockton Slough.

Q. You do not know how deep the water was, or anything about that? A. Four feet.

[Testimony of T. P. Whitelaw, for Petitioner.]

T. P. WHITELAW, called for the petitioner, sworn.

Mr. EELLS.—Q. What is your business, Captain Whitelaw?

A. Well, I am in the wrecking business and dealing in metals and machinery.

Q. Raising wrecked vessels? A. Yes, sir.

Q. And salving them? A. Yes, sir.

Q. How long have you carried on that business?

A. Since October, 1868.

Q. Have you a plant for that purpose?

A. Yes, sir.

Q. How does it compare with other similar plants on this coast?

A. I think we have got the only good one there is.

Q. It is effective for that purpose?

A. Yes, sir.

Q. Do you remember the occasion of the loss of the steamer "Dauntless"?

A. I remember the "Dauntless" sinking a number of years ago.

Q. Along in August of 1901?

A. I would not be positive about the date. I should judge it is 5 or 6 years ago.

Q. You recall the circumstance?

A. Yes, sir. I remember her sinking.

Q. Did you do anything relative to raising her?

A. There was an old gentleman came to see me about getting her up. I think his name was Gillis—a tall, slim man.

(Testimony of T. P. Whitelaw.)

Q. About what time was this that he came?

A. I think the vessel had been down then two or three days.

Q. You were in San Francisco?

A. Yes, sir.

Q. That is where your headquarters were?

A. Yes, sir, I was on Spear Street at that time.

Q. Describe what occurred at that interview.

A. He explained the situation to me as near as he could. I told him I would send a man up there to take a look at it.

Q. Did he tell you how she lay?

A. Yes, sir.

Q. And you sent a man up there?

A. Yes, sir.

Q. And what report did the man make to you?

Mr. FRANK.—I object to that.

Mr. EELLS.—I withdraw the question.

Q. Did the man's report to you confirm the statement that Mr. Gillis made?

A. There was a little difference, not a great deal.

Q. Substantially the same?

A. Substantially the same.

Q. What action, if any, did you take on receiving this report?

A. Mr. Gillis came down again to see me, and he asked me what I would charge to lift the vessel. I said I would charge $5,000, no cure no pay, and to deliver either in Stockton or in San Francisco.

Q. How long would it take to do that?

A. Wrecking is uncertain. Sometimes there are things you cannot foresee, such as freshets in the

(Testimony of T. P. Whitelaw.)

river. My idea was I would complete it in from 10 to 15 days.

Q. And how long was this interview after the first interview?

A. I think it was two days; possibly it was three days.

Q. All together?

A. It might have been three days.

Q. What reply was made to you at that time by Mr. Gillis?

A. As near as I can remember, he said that it was too high, that he thought he could do it for less money. I told him I was willing to rent him any appliances he wanted at a reasonable rate.

Q. You offered to do so? A. Yes, sir.

Q. Did he accept your offer?

A. Not at that time. He did later on.

Q. How much later on?

A. I don't know that my memory is good enough to state. I think it would be three weeks later that he came and got some appliances from me.

Q. What did you give him at that time?

A. I gave him some pumps, and one of our divers went up there—I think it was Tucker.

Q. You furnished him pumps and men, then?

A. Yes, sir.

Q. For raising the "Dauntless"?

A. Yes, sir.

Q. What method should have been employed in raising the "Dauntless" from her position as told to you by Mr. Gillis?

(Testimony of T. P. Whitelaw.)

A. Well, would it be proper for me to explain how I would do those things?

Q. You are familiar with this business?

A. Yes, sir.

Q. You have done it a long time?

A. Yes, sir.

Q. I am asking you, what was, in your judgment, the proper means of setting about the raising of the "Dauntless"?

Mr. FRANK.—I object to that, because it does not appear that the witness had any personal knowledge whatsoever of the surrounding conditions and the attendant circumstances. Anything he may testify to is founded on hearsay, and subject to, as he himself has testified, things happening that could not be foreseen.

Mr. EELLS.—Q. Answer the question, subject to that objection.

A. The first thing we do when we take hold of a wreck is to take in the conditions surrounding the wreck; the feasibility of carrying her from where she is to a point that we can get the main decks above water. We generally canvas them and batten them up to keep the mud from getting in, because the precipitation of the river is very rapid, and it does not take long to accumulate a weight that is greater than the ship herself, that is, the precipitation of mud is so great in the river.

Q. Taking her as she was, and as you estimated the expense of salving her, what was the proper course to follow for the purpose of bringing her into

(Testimony of T. P. Whitelaw.)

Stockton or San Francisco, as you had planned to do?

A. My intention, if I had had the contract, was to patch up the break that was in her, canvas her over, and pump her out.

Q. Was that the most expeditious thing to do?

A. That is the quickest way to do it, and the least possibility of injury.

Q. That was the natural thing to do, was it?

A. Yes, sir.

Q. Did that require special appliances?

A. No, sir, not in the way that we handle most of them. Once in a while, we have to put some timbers across to put chains underneath. If the break is so great that we cannot get at it to patch it, sometimes underneath the bottom of the vessel may be that she is resting on the break so that the divers cannot get to it.

Q. What is the danger of delay in raising a vessel that is sunk in a river like the San Joaquin?

A. Well, in either the San Joaquin or the Sacramento, as I tell you, the precipitation is the greatest danger—the accumulation of sand inside of her.

Q. Does that occur rapidly?

A. In some cases, I have known it to increase as much as two inches a day when there has been a freshet in the river, and the water flowing in around becomes tranquil inside, and the precipitation commences immediately.

Q. Is that greater on a bank or bar than it would be in deeper water?

(Testimony of T. P. Whitelaw.)

A. It is no greater on a bar unless the resistance is sufficient to stir the bottom on, in which case it will rise and get to a tranquil point and settle.

Q. What is the danger from these accumulations, what effect do they have on the bottom?

A. No effect until you come to lift her. If it is necessary to use chains, providing you could not stop the holes and pump her out, the weight becomes so much greater that you are liable to pull the vessel to pieces in getting her out.

Q. You are liable to hog her, as they call it?

A. Yes, sir, it would be the same as hogging. All flat vessels, if you displace any of the hog chains, she will hog herself, and the chains will break.

Q. Do these accumulations of mud and sand injure the machinery?

A. No, sir, I do not think the question of the mud or sand would hurt the machinery but very little.

Q. Would the machinery be hurt by being submerged? A. No, sir.

Q. A few weeks more or less would not make any difference to that? A. No, sir.

Q. What would be the effect on the upper works of a vessel lying two or three months under water in that condition?

A. If it was not exposed to a choppy sea or a strong current, it should not hurt her any.

Q. The water logging would not affect her?

A. Not beyond starting the paint, and making the paint leave the wood.

(Testimony of T. P. Whitelaw.)

Q. I suppose that this deposit forms on the upper decks and in the cabins there as well as below, does it not?

A. Wherever the water rises above the woodwork there will be a deposit.

Q. Would the plan which you have described for raising the vessel involve mutilation of her upper works?

A. Well, not the houses particularly; possibly we might have to cut four openings into it to run timbers through. As a rule all those stern-wheel steamers, the houses are all on the upper deck and in the freight space was where these timbers would go across.

Q. So that the vessel would have been practically, if raised in that fashion, intact except for the hole made by the collision?

A. Yes, sir, if she was taken rapidly and not leaving her to lay too long—go on at once and cover her up so that the mud would not get into her.

Q. The mud would be the danger?

A. Yes, sir.

Q. The longer she lies the greater the accumulation of mud? A. Certainly.

Q. And therefore the consequent injury in raising her? A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. You made no personal examination of the condition of this vessel?

A. No, sir, I did not.

(Testimony of T. P. Whitelaw.)

Q. You do not know what had happened to her in the way of injury before she went down, do you?

A. Nothing only what was told to me.

Q. Told to you by whom?

A. By the man I sent there as an expert to examine her, a man I could rely on.

Q. You do not know as a matter of fact that her stanchions had been pulled out before this time?

A. The stanchions had been pulled out?

Q. Yes, the support of her upper works. You did not know that. If that is a fact you did not know it? A. I did not know it, no.

Q. Now, when you come to go to work on a proposition of that sort, I presume that the manner in which the vessel lies on the bottom, the condition of the current, and whether or not she had already been hogged by her position on the bottom would all be material things to be considered, would they not?

A. Certainly, if she was already hogged.

Q. If she was already hogged, this manner of raising her of which you speak would not be practicable?

A. Yes, sir, you can raise them under any conditions, but it would cost more money and retard you some but you can raise her.

Q. I mean you would have to adopt other means to raise her?

A. No, sir, I don't think so. When you say "stanchions," you mean the studding going from the main deck to the upper deck.

Q. I mean the support to the upper deck.

A. That is the studding to the upper deck.

(Testimony of T. P. Whitelaw.)

Q. Did you know someone else had been working on that vessel for sometime before Mr. Gillis undertook to raise her himself?

A. I don't know who worked on her. At the same time I sent a man none was there. Mr. Gillis came to me direct.

Q. Do you know what the date was when he came to you?

A. I don't know. My memory is not good enough for that.

Q. How can you say none had been working on her?

A. He told me when he came there so; that he came to see what I would charge to take hold of the wreck. He said it was a very easy job and he said "Your price is exorbitant; it wouldn't take you but a few days."

Q. Being such an easy matter, and being convinced of that, you wanted to charge him $5,000?

A. I did not take anybody's sayso for that. I sent a man there to see to be sure.

Q. You came to the conclusion it was not such an easy matter?

A. We are not in that business for pleasure, and if we go on a job we expect to be paid for it, particularly in saving people's property.

Q. I understand that. My question is in answer to your suggestion that Mr. Gillis said it was a very easy job. You cannot fix the date when he came there at all? A. No, sir.

(Testimony of T. P. Whitelaw.)

Mr. EELLS.—He said two or three days after the accident.

Mr. FRANK.—Q. How do you know it was two or three days after the accident? Did you say it was two or three days after the accident?

A. I did say so.

Q. When was the accident?

A. I could not say. I knew of the vessel sinking. We were on the lookout for all those things to find out if they wanted any assistance, and Mr. Gillis came to my store on Spear Street.

Q. You now think it was two or three days after the accident when he first came there?

A. Yes, sir, I think it was the evening of the third day when he came there. We know when anything happens in that way. We get word, and keep a record of it. Unfortunately all the records of those things were destroyed by the fire.

Q. That is our misfortune too. How was she lying at the time?

A. As near as I remember she was down by the stern, and her bow hung up on the edge of a bar or bank, as you might call it.

Q. How much was she submerged?

A. She was submerged nearly to the upper house.

Q. Did he tell you anything about the condition of her interior, or her works?

A. No, sir. We never go inside as a rule. We always look for the damage on the outside.

Q. Do you know anything about the condition of the current, where she lay? A. Yes, sir.

(Testimony of T. P. Whitelaw.)

Q. What was it?

A. The current runs pretty strong at times; other times it does not.

Q. How near to this period had you last been up there?

A. I was up there, I think, just about two years before this accident happened to her, on a dredger.

Q. Is that the only time you were up there?

A. No, sir, I have been up there a great many times.

Q. On wrecking work? A. Yes, sir.

Q. In that same neighborhood?

A. Along the river in different places; probably not at that bend. They are pretty much all alike.

Q. Of course when you start out on a job of that sort, you may figure upon doing it in 10 days, and very often do, and you find that it takes you not only days but months?

A. No, sir; as a rule it never takes months. We sometimes get mistaken in the actual time. Sometimes we get through much quicker.

Q. Have you not frequently failed in your wrecking operations?

A. Never but five times out of 167.

Q. When I say "failed," you have failed to get them up—who are you passing the wink to?

A. To nobody. I was not winking to anybody. I did not know that was a weakness of mine.

Q. You are on the witness-stand now?

A. Correct.

(Testimony of T. P. Whitelaw.)

Q. And I expect your answers to be as fair to me as the other side?

A. I intend to give them to you when I understand it.

Mr. LEVINSKY.—Was the question who he winked at?

Mr. FRANK.—Yes.

Q. Let me ask you, has it not frequently happened to you that your calculations with reference to the length of time in which you could raise a vessel have been out very largely?

A. Sometimes conditions change, yes. There is no doubt about it. There are times that a storm comes along. I have been on a ship when everything was ready to go to work, and it has come along and washed everything off, and I would have to start over again.

Q. And something would go wrong that you did not calculate on?

A. A pump might break down.

Q. Or your cables might give way?

A. Yes, sir.

Q. There are hundreds of incidents?

A. There are things that might happen, certainly.

Q. So that the mere fact that a thing has taken longer than you anticipated, would not necessarily lead to an inference that it was not properly done?

A. I know how I would do it.

Q. You do not intend to say they did not do it properly when they did do it?

(Testimony of T. P. Whitelaw.)

A. Nothing more than the report from the men that they did not; that the men told them they ought to do things in a certain way.

Q. This is all hearsay?

A. This is from our men. I was not on the ground.

Q. So far as you know personally there was nothin done there that was not in the best method and the best skill displayed so far as you personally know?

A. Personally know? Only what I heard my man say.

Q. A great many times men are disgruntled, and have feelings about matters?

A. It could be, but those men have no object in saying anything that is not correct.

Q. Did you see the "Dauntless" after she was up?

A. Sometime after she was up. Not right then I did not.

Q. Did you examine her before she was sold, with the idea of buying her.

A. I went to look at her with a view of buying her, but I did not buy her.

Q. Why did you not buy her?

A. I did not think she was an investment that would suit my business.

Q. Did Mr. Gillis put any price on her before?

Mr. LEVINSKY.—I object to the question as immaterial, incompetent and not cross-examination.

(Testimony of T. P. Whitelaw.)

A. I never heard Mr. Gillis pass a remark about the value of the ship one way or the other.

Mr. FRANK.—Q. Was there anybody there to sell her that put any price on her?

A. No, sir. I generally use my own judgment about the price I put on.

Q. I know, when you put the price on yourself, but when you are dealing with another man that is another thing. There is a man who is selling and a man that is buying? A. Correct.

Redirect Examination.

Mr. EELLS.—Q. The sinking occurred on the 24th of August. What have you to say about the current in the San Joaquin River at that time of the year? Is it liable to freshets or great variations?

A. Rarely ever do we have any freshets in the Sacramento.

A. This is the San Joaquin?

A. Or either one; both rivers generally rise together. Rarely ever have we any before the 15th of September, when the first heavy rains come.

Q. The only variations then would be the daily tide? A. Up and down.

Q. How about the height of the river at the end of August?

A. It is about as low as it gets at any time of the year.

Q. What would you say as to the raising of a vessel of the type of the "Dauntless" sunk in the river, where the raising of her took from 3 to 4

(Testimony of T. P. Whitelaw.)

months. Does that seem to you as a reasonable time for a service of that character?

Mr. FRANK.—I object to that as immaterial and incompetent, as no conditions are before the witness.

A. I think that at that time of the year there is every reason to believe that vessel should be lifted out in from 10 to 20 days.

Mr. EELLS.—Q. You put that as an outside figure? A. Yes, sir.

Q. After allowing for all possible delays and accidents?

Mr. FRANK.—One moment, Mr. Eells. Let the witness testify. You are not testifying yourself?

A. I should say from 10 to 20 days.

[Testimony of George H. Goodell, for Claimant (Recalled).]

GEORGE H. GOODELL recalled.

Cross-Examination Resumed.

Mr. LEVINSKY.—Q. Captain, you were the captain of the "Dauntless" the night of the collision? A. Yes, sir.

Q. When the bow of the "Mary Garrett" was into the "Dauntless," immediately after the collision, did you not order the Captain or pilot of the "Mary Garrett" to pull away from you?

A. I do not remember doing so, no.

Q. It may have occurred, and you have forgotten it?

A. I don't think I did, because I was not in the pilot-house at that time. I was in the pantry.

(Testimony of George H. Goodell.)

Q. I understood from your testimony the other day, that you stated that the "Mary Garrett" after you had put your vessel on the bar, had pulled into deep water; is that correct? A. Yes, sir.

Q. How did that occur?

A. He put his spring-line on our king-post just as described, and pulled his boat in as though he was made fast to a wharf. I did not testify that he pulled so hard that he parted that line, but he parted that line.

Q. Where was that line fastened?

A. To the king-post.

Q. What do you mean by "king-post?"

A. That is the amidship post over which the main hog-chains run. That holds up the bow and the stern.

Mr. FRANK.—Q. You say he broke the king-post?

A. No sir, he broke the 5 or 6 inch line, whatever kind of line he had.

Mr. LEVINSKY.—Q. When was that?

A. That was after we had backed her down on to the bar.

Q. Did he offer you a line which you refused?

A. I don't know of any such occurrence, no.

Q. Did he offer you a line which you told him—or was there a line made fast which you ordered cast off?

A. I don't remember such an occurrence.

Q. Where was the line fastened on the "Dauntless" when she was finally made fast?

(Testimony of George H. Goodell.)

A. On the after queen-post, on the starboard side. It was either the after one or the second one from the after one.

Q. Is there any difference between the queen-post and king-post?

A. We designate them as "queen-post" and "king-post."

Q. When the "Dauntless" was attached to the "Mary Garrett," did not the "Mary Garrett" push on the "Dauntless" for the purpose of pushing her up on to a shoal?

A. I don't know what she did the first time. I think possibly she did the second time.

Q. When you reached the place where the "Dauntless" stopped that night after the "Mary Garrett" had been fastened to the "Dauntless" did you cast any anchors? A. No, sir.

Q. Did you cast any anchor at any time that evening after the collision?

A. I got an anchor ready to cast, and when the mate told me we were in 4½ feet of water the anchor never went overboard.

Q. Why?

A. Because he said, "There is 4½ feet of water under our bow." I said, "All right, then there must be about 3 under the stern." The rudders were gone, and the boat was perfectly safe, and the passengers were running about harum-scarum, and I ordered all hands to attend to the passengers to get them up on deck. That anchor never went into the water until after she slid off.

(Testimony of George H. Goodell.)

Q. Did you anchor at all? A. No, sir.

Q. You testified the other day you took no hawser ashore? A. No, sir.

Q. Or no kedge? A. No, sir.

Q. What time was it when you left that vessel?

A. I left her in a skiff. The "Mary Garrett" came back after me, and I went into my room and took my things out in a small boat and left her, and got on to the "Mary" about half an hour after it was all over.

Q. As a matter of fact when you left the "Dauntless" the water was not flowing over the Texas deck?

A. It was in my room I should say about 2 feet. My room is in the Texas deck.

Q. Was there not about 2 inches of water on the Texas?

A. The after end of the Texas was out of the water. The forward end of the Texas had about 2 feet of water on the floor.

Q. Was anyone left on the "Dauntless" when you left her?

A. A mate, Ben Barringer. I don't know whether he was mate or watchman—I think he was mate, and two or three men for the purpose of saving whatever might be done.

Q. Not for the purpose of doing anything towards saving the "Dauntless," however?

A. Just to watch the wreck. I left him there for the purpose of watching the "Dauntless."

Q. You never went back to the "Dauntless"?

(Testimony of George H. Goodell.)

A. The next day, as soon as I could get back with the "Weber."

Q. Was anything done that day towards saving the "Dauntless"?

A. Not towards saving the vessel.

Q. Any anchors put out? A. No, sir.

Q. Any lines made fast? A. No, sir.

Q. What was her position the next day?

A. Just as it was when we left her. There was about 14 feet under her stern, and 23 under her bow.

Q. Did you have any conversation with Mr. Gillis the day after the wreck?

A. I suppose so, yes. I reported the condition of things.

Q. Did he say that he was not going to fix her and abandon her to the California Navigation and Improvement Company?

A. I don't remember the details of conversations that occurred.

Q. Was that the substance of his conversation?

A. I could not say that it was. I was in serious trouble myself—master of the vessel, and the vessel down at the bottom of the river, and I was guarding myself as master of that vessel.

Q. What do you mean by "guarding" yourself?

A. I did not want the responsibility of the sinking of that vessel. I did not want any of that responsibility because I deserved none, and I was taking all manner of precautions to guard against that being thrown upon me as master of the vessel.

Q. Thrown upon you by whom?

(Testimony of George H. Goodell.)

A. By Gillis, or the crew, or the passengers, or the inspectors.

Q. How would the discussion between you and Mr. Gillis affect that?

A. That is why I would not be apt to remember details of a discussion concerning it.

Q. Without going into specific details did not Mr. Gillis say to you that he was going to abandon the vessel to the California Navigation & Improvement Company?

Mr. FRANK.—I submit that is incompetent and immaterial, what he said. What he did is the only subject of this investigation?

A. I don't remember Mr. Levinsky.

Mr. LEVINSKY.—Q. Did you have any conversation to that effect with Mr. Gillis either before or after the inspector's investigation in this case?

A. I know that Mr. Gillis had advice on that matter; that is, I remember something of that kind occurring, and he told me that he was going to do all he could to raise the vessel. I remember something of that kind occurring. He got some advice on the subject.

Q. How long was that after the accident?

A. I could not tell you that.

Q. Did he not state to you before he ever started in on any work at all on the vessel, within say five days after the accident, that he was not going to do anything, that he was going to abandon this vessel to the California Navigation & Improvement Company?

(Testimony of George H. Goodell.)

A. I don't remember of such a conversation.

Q. It might have occurred and you have forgotten it?

A. It might have occurred; yes.

Q. Did you at the time when the bow of the "Mary" was into the "Dauntless" send anyone downstairs to attempt to fix the hole?

A. Yes, sir, I have a recollection of sending Barringer down to see what could be done.

Q. Prior to the "Mary Garrett" leaving the "Dauntless" did the captain of the "Mary Garrett" ask if he could do anything for you, or what you wanted him to do?

Mr. FRANK.—I object to that as immaterial. It was his duty to do everything he could for us, and more than that it was his duty to raise the vessel.

Mr. LEVINSKY.—Are you testifying? That is the question you asked Mr. Eells just now.

Mr. FRANK.—I am stating the legal conclusion, and the ground of my objection.

A. I do not remember.

Mr. LEVINSKY.—Q. As a matter of fact, did not you tell Captain Strother to pull away?

A. I do not remember. I would not be apt to with a hundred people on board. I do not think I did.

Q. After he had saved all of your people?

A. After he saved all of the people? I do not remember what occurred.

Mr. FRANK.—What do you mean by "pull away," leave the wreck?

(Testimony of George H. Goodell.)

Mr. LEVINSKY.—Yes.

The WITNESS.—I do not remember what occurred.

Redirect Examination.

Mr. FRANK.—Q. Captain Goodell, do you know what steps Mr. Gillis took after the wreck to enlist the California Navigation & Improvement Company in the work of raising her?

A. No, sir, not to answer correctly. I knew there was—no, I cannot remember what was done at that time. He took that in hand.

Q. Do you know as a matter of fact that he did make efforts to enlist them in the work of raising her?

A. I think he did. I know he did, but the details of that I do not know.

Q. Do you know how long he was engaged in attempting to get them to do the work of raising her? A. No, sir.

Mr. LEVINSKY.—That is assuming such a thing occurred.

Mr. FRANK.—He says he knows it.

Q. Do you know whether or not the California Navigation & Improvement Company sent men and materials to the wreck? A. Yes, sir.

Q. And do you know how long they were at work in that way? A. No, sir, I don't know exactly.

Q. Before they finally quit and turned the work over to Mr. Gillis.

Mr. LEVINSKY.—That is assuming a state of facts that does not appear in evidence, that the Cali-

(Testimony of George H. Goodell.)

fornia Navigation & Improvement Company ever quit or turned the work over to Mr. Gillis, as thus far disclosed?

A. No, sir, I do not know. I do not know much of that transaction. I was very busy running the "Weber" and this was bothering me. Passengers were coming around bothering, and everything was disturbed. I know I left it to him and paid no more attention to it.

Q. Did you make an examination after the wreck, after she had been pulled off the bank into deep water, and lodged there?

A. No, sir. After she had been pulled off of the bank?

Q. Yes. A. In deep water?

Q. Yes, by the "Mary Garrett"?

A. I made no examination.

Q. Between the time that you placed her on the sand-bank and the time that the "Mary Garrett" pulled her off into deep water, what were you engaged in doing?

A. In putting life-preservers on the passengers, and doing what I could to quiet the women and children, the work I was supposed to do and am responsible for.

Q. Then she pulled off of the bank and into the wreck during the time of the commotion and the excitement on board of the vessel, and before there was any time for careful consideration on the part of the officers of the "Dauntless" as to details for holding her on there?

(Testimony of George H. Goodell.)

A. Yes, sir, it was all confusion. There were lots of women and children there screaming and crying and taking on. We had all we could attend to.

Q. You considered your first duty was to save the passengers?

A. Yes, sir, I am responsible to the Government for that. That means my license.

Q. How often do you go up and down? When do you go out again?

A. I have to be down there at half-past 4.

Q. When will you be in again?

A. I will be in Sunday morning.

Q. How long do you lay over?

A. Until Monday evening at half-past 4; I have to report there at half-past 4 Monday evening.

Recross-examination.

Mr. LEVINSKY.—Q. As a matter of fact, were you not in deep water, had gone off of the bank before the "Mary Garrett" made fast to you?

A. No, sir, we were hard and fast on that bar.

Q. You say you know—were you present with Mr. Gillis when he went at any time to the Navigation company? A. No, sir.

Q. You only know it from what Mr. Gillis told you? That is hearsay. A. That is hearsay.

Mr. LEVINSKY.—I move to strike it out then.

The WITNESS.—All of that would be hearsay with me. The only thing I know is what occurred in that collision, and what occurred in removing the

(Testimony of George H. Goodell.)

boat off of the bar. That I know because that was very vital to me at that time.

Q. If you were only in about 3 or 4 feet of water before the "Mary Garrett," as you say, pulled you into deep water, where was the serious danger to your passengers, that caused you so much worry?

A. I came very very near making a bad mistake on account of my positiveness. The purser came to me to know whether he should call those passengers. I told him no, I was so solid on that bank, with that cabin full of sleeping passengers. For some unknown reason I followed him up and told him "yes" and he called them all up. The next thing that occurred was the transaction that pulled us out into deep water and I would have drowned them—that whole cabin full of passengers. That is how I know that.

Q. Did you tell the captain of the "Mary Garrett" where to make fast to?

A. I did not give him any instructions that I remember.

Q. He just came alongside of his own free will?

A. Yes, sir, and did the best he could, I suppose.

Q. Did you request him to come alongside?

A. Not that I remember.

Q. Is it not a fact that you told him to come alongside?

A. I don't remember telling him anything.

Q. Did not the employees of your vessel place the line on the "Dauntless" and fasten her on the "Dauntless" in the place it was fastened?

(Testimony of George H. Goodell.)

A. It may have been fastened. I don't know who put the line on that post.

Q. Did they not offer you a line some 5 or 10 minutes before you took it? Did not the officers of the "Mary Garrett" offer you a line some 5 or 10 minutes prior to the time of your taking it?

A. I do not remember.

Redirect Examination.

Mr. FRANK.—Q. Let us understand this thing: the reason, as I understood you on your direct and cross examination, that the "Mary Garrett" pulled off of the bank and into deep water, was because instead of coming alongside of her he tried to swing himself up by steaming up against this line?

A. Yes, sir. We put our rudders over. When we are landing alongside of the wharf we get out this spring-line, and back on the spring-line, put our rudders over, and pull ourselves in, alongside of the wharf.

Q. In other words, the tension is on this line?

A. Yes, sir.

Q. That is the reason, by putting the tension on this line that he pulled you into deep water?

A. Yes, sir. Had it been a wharf he would have come alongside.

Q. So it was not where the rope was made fast that caused the disaster, but the manner in which the vessel steamed up that did it?

A. Yes, sir, it made no difference where it was made fast.

(Testimony of Robert Don.)

Mr. LEVINSKY.—Q. How long did it take from the time of the collision until the vessel was raised and brought to Stockton—the "Dauntless"?

A. About four months; I don't know exactly.

Mr. FRANK.—Q. You do not know anything as I understand about the details of the raising, and why it took so long?

A. No, sir, nothing. I did not pay any attention to that.

[Testimony of Robert Don, for Petitioner.]

ROBERT DON, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What is your business?

A. I am in the machine business at the present time, and engineering.

Q. Who are you employed by at the present time?

A. By the United States Government.

Q. At what place? A. Mare Island.

Q. State whether or not you have been engaged in the steamboat business? A Yes, sir.

Q. For how many years?

A. Ever since 1874.

Q. I will ask you to state whether you hold a Master's license? A. I have.

Q. A pilot's license? A. Yes, sir.

Q. And an engineer's license?

A. Yes, sir; I carry an engineer's license now. I dropped the pilot's license.

Q. Were you ever employed by the California Navigation & Improvement Company?

A. No, sir.

(Testimony of Robert Don.)

Q. Did you know Mr. Gillis in his lifetime?

A. Yes, sir.

Q. Do you remember the occurrence of the collision between the "Dauntless" and the "Mary Garrett"? A. Yes, sir.

Q. Did you have any conversation with Mr. Gillis the day following that collision?

A. Yes, sir.

Q. Where did you have that conversation?

A. In San Francisco.

Q. Please state what that conversation was?

A. I met Mr. Gillis, and I says to him, "Well, Mr. Gillis, you are in pretty bad luck." He says, "Yes, they have sunk the boat for me." I says, "Ain't you going to raise her?" He kind of shrugged his shoulders. I said, "If you don't you will lose her; you had better get at it pretty quick, not to let her lay down there." He says, "I am not going to do anything with her. I am going to let her be, and let the company pay for it."

Mr. FRANK.—I move to strike that out as immaterial and incompetent.

Mr. LEVINSKY.—We submit that the counsel cannot wait without making an objection until after the answer is given and then not suiting him move to strike it out, he not having made an objection to the question.

Mr. FRANK.—I should like you to explain how I can know what your witness is going to testify before he has stated it, and so far as to it not suiting

(Testimony of Robert Don.)

me, that is a matter of inference on your part. I suppose you feel that anything you say does not suit me. That is the only ground for that assumption.

Mr. LEVINSKY.—Q. Were you subsequently employed by Mr. Gillis, to go down to the steamer "Dauntless"? A. Yes, sir, afterwards.

Q. About how long afterwards?

A. I went down the first time; about two weeks I guess it was; 10 days or two weeks.

Q. Who, if anyone, was in charge?

A. Delaney was at that time.

Q. Did you go down at the request of Mr. Gillis the first time? A. Yes, sir.

Q. What did you do then?

A. Kind of looked around; done all I could to help Mr. Delaney for Mr. Gillis.

Q. Did Mr. Delaney subsequently give up the work?

A. They came there and tried to—We got lines to her and they came there with two steamers one night. Mr. Gillis was there and said they were going to try and pull her up the river with two steamers. After they hauled her a hundred yards the lines broke, and Mr. Gillis says, "We will quit right now, and go to Stockton and let her be."

Q. Did they all go to Stockton?

A. All but one man. He stayed there to watch her.

Q. Do you know who that man was?

A. I forget his name. Ned, we called him. He was on the schooner that used to belong to John Eng-

(Testimony of Robert Don.)

A. About two weeks.

Q. At whose request did you go back the second time? A. Mr. Gillis'.

Q. What did he state to you then?

A. He wanted me to come down there—first, he wanted me to take a contract. I told him no, I did not want no contract. Then he wanted me to go down and superintend the thing, providing the old company would give us a boat and what we could get out, gear and anything we could get out.

Q. Did the old company send a boat?

A. They gave us a boat.

Q. And the gear?

A. And the gear, and the timbers, everything, except the grub that was on the boat.

Q. How long did you remain there that time?

A. 28 days, I think it was; something like that.

Q. Did you get the vessel up? Did you get the "Dauntless" raised?

A. We raised her about 15 feet.

Q. Why did you stop?

A. Because Mr. Gillis was dissatisfied, I guess. He told me he had another man. He thought I was not doing right.

Q. Do you know that place, Bradford's Bend, where that collision occurred? A. Yes, sir.

Q. How long have you known it?

A. Since 1874.

Q. Have you steamboated around there?

A. Yes, sir.

Q. For what length of time?

A. Ever since 1874.

(Testimony of Robert Don.)

Q. Do you know the shoals there by Bradford's?

A. Yes, sir, I know where there is a shoal there.

Q. Did you have any conversation with Captain Goodell as to where the accident occurred?

A. No, sir.

Q. Or with Mr. Gillis?

A. No, sir. Only he told me as we were going down about where it was, one trip, one he was on the boat.

Q. If anchors had been put down on the "Dauntless" when she was on this shoal, would she have gone off into deep water?

A. I don't know what you mean by that.

Q. Assuming that the "Dauntless" was backed on to the shoal at Bradford's immediately after the collision, where there was about three feet and a half or four feet of water, if anchors had been put out from the "Dauntless," would she have gone into deep water?

A. She never was in that depth of water.

Q. During the time you were there?

A. No, sir, nor any other time.

Q. Who took charge after you left?

A. A man named Roach.

Q. Do you know how long he was there?

A. He was there about two weeks, I guess.

Q. Do you know if anyone succeeded him?

A. I don't know. I came to the city after that I don't know who was there afterwards, only from hearsay. A man named Tucker, I heard, was there afterwards.

(Testimony of Robert Don.)

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(Testimony of Robert Don.)

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(Testimony of Robert Don.)

Mr. FRANK.—Never mind what you heard. What you heard is not competent evidence.

Mr. LEVINSKY.—Q. Did you see the "Dauntless" after she was raised? A. Yes, sir.

Q. Did you see the size of this hole?

A. Yes, sir.

Q. Describe it.

A. The hole that came from that guard down to within two feet of the bottom, like that (illustrating).

Q. A V-shape? A. Yes, sir.

Q. About how wide was the hole at the water line?

A. It was not over 10 or 12 inches—10 inches.

Q. How far below the water line did the hole extend?

A. Not over three or four inches.

Q. Could that hole have been stopped?

A. Yes, sir.

Q. How?

A. By putting a canvas or anything over the outside of it.

Q. About how long would that have taken?

A. How long would it have taken to have done it?

Q. Yes. A. About 15 minutes.

Q. When could it have been done?

A. Immediately when they found there was a hole there.

Q. Could it have been stopped by putting in a mattress or anything of that sort?

A. Yes, sir, they could have done that, too.

(Testimony of Robert Don.)

Q. Was it necessary then to beach the boat to save her from sinking?

A. It would have been the safest plan to have done that. They could have stopped the flow of water in there so that they could have taken care of the flow with their pumps.

Q. While you were working there, and the manner of your working, state whether or not it was under the orders of Mr. Gillis? A. Yes, sir.

Q. Were those orders in accordance with your views? A. Some were and some were not.

Q. Did you at any time ask for any materials to assist you—ask Mr. Gillis—that were not furnished you? A. Yes, sir.

Q. What kind of materials?

A. A coil of line and triple blocks, three sets.

Q. Did you tell Mr. Gillis that you needed them?

A. Yes, sir.

Q. Were they ever furnished you?

A. No, sir.

Cross-examination.

Mr. FRANK.—Q. Mr. Gillis, so far as you knew, was at all times trying in good faith to save that vessel, and save all he could from it, was he not? A. Well, I don't know about that.

Q. You do not know about that?

A. No, sir.

Q. Were you, when you were operating it for him, trying in good faith to do what you could?

A. I was.

(Testimony of Robert Don.)

Q. And you had a full, free hand to do what you could in that respect? A. Yes, sir.

Q. So far as what was done when you were not there, you mean to say, you do not know anything about it, is that right?

A. No, sir, I do not. I know what was done when I was there.

Q. I say when you were not there?

A. When I was not there, I do not know what was done.

Q. Did you and Mr. Gillis have any falling out?

A. No, sir. The only falling out we had was, he told me he did not want me any more; he had the other man to do the job, and I told him all right.

Q. You were not present when the vessel sank?

A. No, sir.

Q. You do not know anything about the conditions existing at the time of the collision?

A. No, sir, I don't know anything about that.

Q. So all you are testifying to about what could be done to prevent the vessel from sinking is merely theoretical and speculative, without any knowledge of the conditions?

A. I know by the looks of the vessel after she was raised what could have been done.

Q. All you are testifying to now, is about the physical condition of the hole?

A. I know what could be done with the hole at the time the vessel sunk.

Q. All you are testifying now is about the physical conditions of the hole? That is all you saw?

(Testimony of Robert Don.)

A. I *see* the hole, and I knew what could be done with the hole at the time of the collision.

Q. That is judging from the physical condition of the hole itself? A. Yes, sir.

Q. What the other circumstances were that surrounded the collision you know nothing about?

A. I know nothing.

Q. We all know, without being experts, that if you have a hole of a certain size you can shove something in it, if you have the time and opportunity to stop the water which rushes in.

A. You will, if you do not get rattled and lose your head.

Q. And if you have not anything else to attend to?

A. That is about the first thing a steamboat man thinks of when he is in collision, and has a hole—to stop the hole.

Q. If they attempted to stop that hole and failed, you would think that your judgment in that respect was at fault, if they attempted to adopt the very things that you suggest. You would think that there was something else that you did not take into consideration?

A. No, sir, because I have seen worse places than that stopped.

Q. If they attempted to use the precautions that you speak of, and failed, there must be something else that you are not thinking of.

A. Maybe they did and maybe they did not.

(Testimony of Robert Don.)

Q. Take the question as given you. Then there are some conditions that you do not know anything about. Is that right?

A. There must have something happened that I do not know anything about at that time that would prevent them from doing it.

Mr. EELLS.—I object to the question on the ground that there is no such evidence in the case.

Mr. FRANK.—There will be.

Q. Do you know how long a time elapsed from the time of the collision until the vessel was placed on the bank? A. No, sir, I do not.

Q. Do you know how many passengers she had?

A. No, sir.

Q. Do you know how far she had to run from the point of collision to the bank?

A. How do you want to put that question? I can answer that in two or three ways.

Q. I put the question to you straight, and you can answer it straight.

A. Where she ought to go, or where she landed?

Q. Where she landed. A. The distance.

Q. Read the question, Mr. Reporter.

(The Reporter reads the previous question.)

A. I will tell you how far she would have to run to get to the bank—not over 400 feet.

Q. I presume so from the middle to the side of the river. I am speaking of the shoal water, where she landed.

A. You ought to have put it in that way.

Q. Now answer it.

(Testimony of Robert Don.)

A. Where she landed the first time?

Q. Yes. A. About a quarter of a mile.

Q. Do you know what time of day it was?

A. Along in the morning some time. I do not know what time it happened; I was not there. I know where the other boat put her.

Q. You yourself worked on this vessel to raise her, one period of twenty days, and another period of two weeks. Is that right? A. Yes, sir.

Q. Any other period?

A. No, sir, that is all.

Q. During the time that you were working on her, you were allowed to adopt your own means, were you not? A. Yes, sir.

Q. You considered them the best means that could be adopted under the circumstances?

A. Yes, sir, that is the way she was raised. The way I started in.

Q. You considered that the best method that could have been employed for that purpose?

A. Yes, sir.

Q. Did I understand you to say that you started in first to raise her about two weeks after the collision?

A. I had no charge of her whatever then. I was down there with another party.

Q. Another party?

A. A man named Delaney.

Q. He was at work when you went down there?

A. I went down with him. He was the man who had charge.

(Testimony of Robert Don.)

Q. He was continuously at work from that time up to the time you took charge?

A. Until we abandoned, or until we left her.

Q. That was how long?

A. Something like two weeks.

Q. Was he employing the proper method to attempt to raise her during the time you were there?

A. No, sir.

Q. Why not?

A. Because he had no timbers or anything to raise her.

Q. He did not have the means?

A. He did not take the means down there to raise her.

Q. Those materials and timbers have to be collected, I presume first? A. Yes, sir.

Q. How long after that did you go down?

A. I guess about two weeks before we started down again.

Q. During that two weeks you were preparing?

A. No, sir.

Q. Do you know if Mr. Gillis was making any preparations?

A. None that I know of. I made all the preparations after he engaged me to go down, and got these things together.

Q. Then you went down, and worked on it for how long?

A. About 28 days; something like that.

Q. When was it that you hauled on her and broke your line?

(Testimony of Robert Don.)

A. That was when Mr. Delaney was there the first time.

Q. And you left her, because at that time there was nothing more that could be done with the material you had at hand? A. Yes, sir.

Mr. LEVINSKY.—That was not the answer of the witness before. My objection is that that is stating a question not based upon the evidence in the case, the witness having testified that the reason he left was because Mr. Gillis ordered them all away.

Mr. FRANK.—Q. Subsequently, after you had worked on her for 28 days, you say you had raised her about 15 feet? A. Yes, sir.

Q. Was that the last time you worked on her?

A. Yes, sir.

Q. Who succeeded you then?

A. A man named Roach.

Q. Do you know if he continued with the same methods that you applied to it? A. Yes, sir.

Q. And finally raised her?

A. Yes, sir. If you want to, I will show you the photographs of it.

Q. Do you know whether or not he worked continuously on her from that time up to the time she was finally raised? A. Roach?

Q. Yes. A. He did not.

Q. How long did he work at her?

A. I think he was down there 2 or 3 weeks.

Q. Do you know where Roach is now?

A. No, sir, I do not.

Q. What is his full name?

A. I do not know his full name.

(Testimony of Robert Don.)

Redirect Examination.

Mr. LEVINSKY.—Q. Did I understand you to say you left the first time, when Mr. Delaney was working there, because you did not have the materials there, or because Mr. Gillis ordered you all away? A. Mr. Gillis ordered us all away.

Q. How deep was the water that the "Dauntless" was in the first time you went down there?

A. 54 feet.

Q. This time, when she was hauled this half a mile, that was by sheer force, by the steamers, was it not? A. No, sir.

Q. How was it?

A. Floating her on the barges.

Q. Lifting her up on to the barges?

A. Yes, sir.

Q. And then pulling the barges?

A. And the tide drifted her up.

Q. The first time you went down, was she standing erect, or had she keeled over?

A. At some stages of the tide she would be standing erect, and other times keeled over, rolling first one way, and then the other. Whichever way the tide was, it would roll it.

Q. Do you know how her upper works became dismantled or broken?

A. No, sir, unless it was through cutting them with an ax.

Q. When you saw her, after she was raised, state whether or not there was slickens, and debris, and mud in her?

(Testimony of Robert Don.)

A. There was a little mud; not very much.

Recross-examination.

Mr. FRANK.—Q. You say there was not much mud in her at all?

A. No, sir, not when I seen her. They might have taken it out.

Q. How long was it, after she was raised, that you saw her? A. Maybe a month.

Q. Where was she lying?

A. Lying over in Oakland.

Q. That is the first time you saw her?

A. That is the first I see of her after that.

Q. You say there was some mud in her?

A. There was some mud in her then.

Q. Do you mean in Oakland or in Stockton?

A. Oakland.

Q. About when was that?

A. I forget; February maybe; somewhere along there; I could not tell you just exactly.

Q. February of what year?

A. The next season after she was lost.

Q. February, 1902?

A. When she was lost?

Q. 1901? A. It was in 1902.

Q. You are positive of that? A. Yes, sir.

Q. Wherever you saw her, however, it was in February, 1902?

A. It might have been February or later. I do not recollect exactly the month. Where I saw her was over in Oakland, in Boole's Shipyard.

Q. Was it in the neighborhood of February?

(Testimony of Robert Don.)

A. I could not answer.

Q. How did you happen to light on February?

A. Because it was 2 or 3 months after I came down here. I think that was when it was. I do not think it was later. It might have been. I have not paid any attention to it. I went over there to put a bid in to overhaul the machinery when she came down. It might have been six months for all I know. That is where I saw her—over there.

Redirect Examination.

Mr. LEVINSKY.—Q. How long did you know the "Dauntless"?

A. Ever since she was built.

Q. Been on her?

A. Never run on her; I have been aboard of the boat, and a passenger, like that.

Q. Ever look over her? A. Yes, sir.

Q. Have you known of boats being sold and bought in the market, since you have been a steamboat man? A. Yes, sir.

Q. What would you say was the value of the "Dauntless" just prior to meeting with the collision?

A. She was worth about $20,000, I guess, or $25,000 at that time.

Q. In your opinion, was she worth any sum to exceed $25,000?

A. Not to exceed $25,000.

Further Cross-examination.

Mr. FRANK.—Q. Did you ever own any of those boats? A. No, sir, none of them.

(Testimony of Robert Don.)

Q. You did nothing but steamboat on them, is that all? A. That is all.

Q. You were simply a passenger on the "Dauntless"? A. Yes, sir.

Q. And made no examination of her, except a casual looking at her?

A. Done work on her, and done repairs on her.

Q. Do you know what kind of wood she was made of?

A. What kind of wood she was made of?

Q. Yes. A. Yes, sir.

Q. What was she made out of?

A. She was made out of pine and cedar.

Q. Where was the pine, and where was the cedar?

A. Cedar frame, and pine planking.

Q. What was the nature of her frames?

A. The frames were cedar.

Q. What was the build of the vessel?

A. She was a molded boat.

Q. Did you know the "Mary Garrett" at that time? A. Yes, sir.

Q. What would you think she was worth?

A. The "Mary Garrett" at that time?

Q. Yes. A. About $15,000.

Q. About $15,000? A. Yes, sir.

[Testimony of M. Homburg, for Petitioner.]

M. HOMBURG, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What is your occupation, Mr. Homburg? A. Pilot.

Q. A licensed pilot? A. Yes, sir.

(Testimony of M. Homburg.)

Q. Do you know the "Mary Garrett?"

A. I do.

Q. What position did you occupy at the time of the collision with the "Dauntless"?

A. First officer.

Q. Were you awake or abed?

A. I was in bed at the time.

Q. Were you called? A. No, sir.

Q. Did you get up? A. Yes, sir.

Q. When you got up where were the "Dauntless" and the "Mary Garrett"?

A. She was tied alongside of the "Dauntless"—the "Garrett" was.

Q. Do you know where the line of the "Mary Garrett" was fastened on the "Dauntless"?

A. Yes, sir.

Q. Where to? A. The hog-post.

Q. Which one—the after one?

A. No, sir, the amidship one.

Q. Where was the "Dauntless" and the "Mary Garrett" when you got up?

A. Right on the Bradford Shoal.

Q. Was she aground? A. Yes, sir,

Q. Which one was aground?

A. The "Dauntless."

Q. Did you see the "Mary Garrett" working on the "Dauntless"?

A. She was backing up at the time.

Q. Backing up the "Dauntless"?

A. The "Garrett" was backing with the "Dauntless" alongside of her, backing towards the shoal.

(Testimony of M. Homburg.)

Q. Did you go on the "Dauntless"?

A. I went aboard.

Q. For what purpose?

A. To try to get the passengers aboard.

Q. When you went on the "Dauntless" what portion did you go to?

A. I went to a stateroom where the gangplank went on to and took a man out of the room. He was sound asleep.

Q. Was any water on the Texas deck of the "Dauntless"?

A. I should judge about 2 or 3 inches.

Q. That was where you took this man out?

A. Yes, sir.

Q. When the "Mary Garrett" went away from the "Dauntless," what was the position of the "Dauntless"? A. Just about the same.

Q. Did you have anchors on board of your vessel, the "Mary Garrett"? A. Yes, sir.

Q. Did any of the officers of the "Dauntless" ask you for any anchor?

A. No, sir; at least I did not hear them.

Mr. FRANK.—No questions.

[Testimony of Edward C. Deane, for Petitioner.]

EDWARD C. DEANE, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What position did you occupy on the "Mary Garrett" the night of the collision with the "Dauntless"? A. Watchman.

Q. Were you on board at the time of the accident?

(Testimony of Edward C. Deane.)

A. Yes, sir.

Q. What did you do? A. What did I do?

Q. Was a line gotten out on the "Mary Garrett"?

A. I did not do anything towards getting a line out.

Q. Who did not? A. I did not.

Q. Did you see a line fastened on to the "Dauntless" from the "Mary Garrett"? A. Yes, sir.

Q. Where was that line fastened?

A. To the king-post.

Q. What was the "Mary Garrett" doing, if anything, with the "Dauntless"?

A. As near as I can figure out, she was shoving on to the "Dauntless"—shoving her.

Q. Shoving her where?

A. Over to a shelf, or flat.

Q. Was she pulling away from the "Dauntless"?

A. Not at that time.

Q. When the "Dauntless" was left by the "Mary Garrett," where was the "Dauntless"?

A. Left by the "Mary Garrett"?

Q. Yes. A. On the flat.

Q. Was that what you call deep water?

A. It was not very deep, no.

Q. Was there any time when the "Mary Garrett" pulled the "Dauntless" into deep water off of a flat or shelf that she was on?

A. Not that I know of.

Q. Everything done that could be done to save the passengers?

(Testimony of Edward C. Deane.)

A. Yes, sir. They were all saved, to my knowledge.

Q. What did you do at the time the accident occurred?

A. I was around in my usual position there. When the accident occurred I went to see if our boat was leaking any—the first thing I did. When I got back from below most of this other business had been done, getting out the lines and gang-planks, and such things.

Cross-examination.

Mr. FRANK.—Q. What do you call deep water—50 feet or something like that?

A. Yes, sir, 50 feet is pretty deep.

Q. When you say it was not very deep water that she was in, she was submerged down to her Texas deck, was she not?

A. At one time, yes; but not at first.

Q. Before you left her?

A. Before we left her, yes.

Redirect Examination.

Mr. LEVINSKY.—Q. She was erect, though. She was standing up? A. Yes, sir.

Q. The water was up to the Texas deck?

A. Yes, sir, just about—from the hurricane to the Texas, the water was nearly to the Texas deck. The hurricane deck was covered.

Recross-examination.

Mr. FRANK.—Q. When you say she was erect, do you mean that she was straight on the bottom, or

(Testimony of Horace Strother.)

was not her bow deeper than her stern, or her stern deeper than her bow?

A. I did not notice which end was deeper.

Q. Which end was deeper than the other?

A. I say I do not know which end was deeper.

[Testimony of Horace Strother, for Petitioner.]

HORACE STROTHER, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What position do you occupy?

A. I am master of the steamer "Claremont."

Q. That belongs to what company?

A. The San Francisco and San Jose Railway.

Q. How long have you been in their employ?

A. About 4 years.

Q. You are a licensed pilot and master?

A. Yes, sir.

Q. And have been for how many years?

A. I got my first license in 1898.

Q. You were captain of the "Mary Garrett" on the night of the collision with the "Dauntless"?

A. Yes, sir.

Q. Were you up at the time of the collision?

A. No, sir.

Q. Did you get up immediately?

A. Yes, sir.

Q. When you came up what did you find?

A. I got up, opened the door, looked out, and saw the "Dauntless" laying across the bow of the "Garrett." I spoke to the bow watchman, who was stand-

(Testimony of Horace Strother.)

ing outside against the rail, and asked him if she was hurt much. He said, "I don't think she is." I went back to the room to put on my clothes. While in there I heard Captain Goodell say to come alongside, that the boat was sinking. Then when we went to go alongside I came out of the room. We tried to make fast to the "Dauntless," but we did not get anybody to take a line.

Q. Anybody on whom?

A. On the "Dauntless," and the boats drifted apart, and then we had to maneuver around to get back in shape to get alongside of the boat. While doing that, the captain of the "Dauntless" backed the boat around, as I remember, against the bank. She just stayed there for a minute, and then drifted off out into the water. At that time I heard something falling overboard. Every time there was a splash of water there was a scream. I was standing on deck, and I told Captain Rideout to hurry up and get alongside of the boat. She was listing over and likely to capsize. We went up to make fast to the "Dauntless," and we went along on her starboard side. She had turned around—the "Dauntless" had. The captain would not let me make fast where I wanted to, because he said I would pull the houses over, or pull the boat over, something like that; some damage I would do to the boat.

Q. The captain of the "Dauntless"?

A. The captain of the "Dauntless" said that; so I dropped back and made fast to a hog-post that run

(Testimony of Horace Strother.)
down through the hole and we took the passengers off from there.

Q. Did the "Mary Garrett" pull the "Dauntless" off of this shelf into deep water?

A. No, sir, we pulled her on to a bank. When we were making fast to her, to take the passengers off, we were backing towards the shore all the time.

Q. How backing?

A. The two boats were laying alongside of one another.

Q. The "Mary Garrett" was backing toward the shoal?

A. The "Mary Garrett" was backing toward the shoal.

Q. For the purpose of putting the "Dauntless" on the shoal?

A. We were taking off the passengers. While we were doing that we were getting up on to the shoal.

Q. As a fact, please state whether or not, after the collision occurred and before you made fast with the "Mary Garrett" whether the "Dauntless" was on a shoal, or whether she was in deep water, when you made fast.

A. She was in deep water when I made fast to her.

Q. How did you come alongside of the "Dauntless"?

A. We approached her from her stern.

Q. Did you break a cable on her?

A. No, sir.

(Testimony of Horace Strother.)

Q. Break a 5 or 6 inch hawser?

A. Not that I remember. We never broke any lines on her.

Q. Never broke a line at all that night?

A. No, sir. I don't think I did.

Mr. FRANK.—Do not lead the witness.

Mr. LEVINSKY.—He does not need it; I am not trying to.

Q. When you got the passengers off, what did you do?

A. I let go from that side of them, and went round to the other side to get hold of him to pull him further up on the bank.

Q. What occurred?

A. I could not do it.

Q. Why not? A. The bank was too steep.

Q. Did you call anybody in to your assistance?

A. Yes, I called the "T. C. Walker."

Q. What company does that belong to?

A. The California Navigation and Improvement Company.

Q. Did the "Walker" make any attempt to get in there? A. She tried to.

Q. What was the result? A. She got stuck.

Q. Why?

A. The water was too shallow. She tried to get in astern of the "Dauntless."

Q. How long did you stay alongside of the "Dauntless"?

A. We made fast to the "Dauntless," I suppose, some time around 2 o'clock.

(Testimony of Horace Strother.)

Q. What time did you leave?

A. We left there sometime between five and six o'clock.

Q. Why did you leave?

A. I left because I could not do anything more. I had offered my assistance.

Q. Who did you offer your assistance?

A. The captain of the "Dauntless."

Q. What was his name?

A. Captain Goodell.

Q. What did he tell you?

A. He told me that I could not do anything more.

Q. In putting your line on to the "Dauntless," how did you come up to the "Dauntless" the first time?

A. I came up approaching the stern of the "Dauntless," came up on her starboard quarter, and we run along the side of the "Dauntless" until we got up to the forward corner of the house, that is, the cabin which comes from the main deck. We tried to get a line out on that post on the corner, a 5-inch post. The captain would not let me put a line out there. So then we came back again and got a line out on this hog-post—a spring-line and head-line—and came in alongside of the "Dauntless," to get a gang-plank up on the deck to take the passengers off.

Q. Did you see her when she was on the shoal?

A. I went on the shoal with her.

Q. When was that?

A. After I made fast to her. She was out in the channel when I made fast to her.

(Testimony of Horace Strother.)

Q. How far was she away from the place where the collision occurred when you made fast?

A. I don't think she was more than 4 or 500 yards away.

Q. When you did make fast to her, I understood you to say you were backing her on to the shoal.

A. We were backing towards the shoal.

Q. Prior to the time that you fastened on to her you had not pulled her off of any shoal?

A. Prior to the time I fastened to her? She was in deep water when I made fast to her. She had backed up against the bank. There was nothing to hold her, and the wind was blowing offshore, and blew her right out again.

Q. Were you asked for any anchors?

A. I don't remember that.

Q. You had anchors on your vessel?

A. Yes, sir.

Q. If any anchors had been attached to the "Dauntless" and cast at the time that the "Mary Garrett" left her, would she have held in her position where she was?

A. If there had been enough fastening to keep her from sliding off, she would.

Q. Would casting of the anchors have been of any benefit? A. I think that would have helped.

Q. I understand no lines were taken to the shore?

A. No, sir.

Q. And no anchors cast?

A. No, sir; that is not of the "Mary Garrett."

(Testimony of Horace Strother.)

Q. I do not think you understand my question. I am asking you, when the "Mary Garrett" left the "Dauntless," no lines had been taken ashore on the "Dauntless"— from the "Dauntless" to the shore?

A. No, sir.

Q. No anchors had been cast on the "Dauntless"?

A. There were no anchors cast from the "Dauntless" from the time we went on the shoal until the time that I left her. I know that.

Q. I am asking you if anchors had been cast there, if it would not have helped to keep her on the shoal.

A. The supposition is that it would.

Q. You have been a steamboat man, I understand you to say, for a number of years.

A. That is what the anchors are for.

Q. That was not done?

A. That was not done.

Cross-examination.

Mr. FRANK.—Q. I suppose your idea is that every little helps? That is about the size of it.

A. The idea, Mr. Frank, is, if you put anchors overboard as they do on many ships, and sometimes they don't hold—

Q. You cannot tell whether they are going to hold or not. It depends on circumstances?

A. Yes, sir.

Q. In order to make an anchor hold, you have to carry it off some distance?

A. You have got to give it range.

(Testimony of Horace Strother.)

Q. Dropping an anchor over from the bow of a steamer like that, it would not hold, would it?

A. I don't know whether it would or not It is according to how the anchor caught in the ground.

Q. It has got to have some scope of chain in order to be of any value?

A. Sometimes in good holding ground you do not have to give any scope to the chain at all.

Q. There is always that difference between pulling straight off from an anchor, and pulling at a sharp angle, necessarily so?

A. Yes, sir, the more scope you give the better chance there is to hold.

Q. Everyone knows that. That is not a very technical knowledge. At the time that you left the "Dauntless" she was submerged above her Texas deck at one end? A. On the forward end.

Q. She was lying at somewhat of a sharp angle from shoal to deep water?

A. As I remember it she was headed about across the river.

Q. What I mean by a sharp angle is, I mean on the bottom, was she shelving out?

A. Was the bottom shelving?

Q. Yes. A. Yes, sir, there was a slope.

Q. That is the way you left her?

A. Yes, sir.

Q. Was there any time when you were there that she was further up on the bank than she was at the time you left her? A. No, sir.

(Testimony of Horace Strother.)

Q. So then, as I understand you, your understanding of it is, that she sunk there in deep water, or what you call deep water—it may not have been the deepest water there—so that in the place she sunk, she was covered at one end above her Texas deck? A. Yes, sir, I believe she was.

Q. There was some testimony here to the effect that when she first went on she went on to a shoal, and that you afterwards came and passed her a line, and in passing up to her you tried to spring yourself in, instead of coming straight alongside, and by that means caused her to come off the shoal on to this shelf. You had no spring line out?

A. When I made fast to the "Dauntless" she was out in the channel and she was floating.

Q. Did she ever get up on to a bank of 2 or 3 feet of water? A. No, sir, not to my knowledge.

Q. To your recollection?

A. She did not, to my recollection.

Q. The best of your recollection is, when she sank, she sank in that deep place where she was covered?

A. When I got hold of her she was not so low in the water as she was when she drifted on the bank. She was sinking all the time.

Q. Finally she did settle down in this deep water?

A. She settled down in this place where we left her.

Q. Was she settling very fast? You said she listed.

(Testimony of Horace Strother.)

A. She did not settle so fast towards the last as the first.

Q. At first she showed symptoms of turning over?

A. When I first went alongside of her I thought she would capsize.

Q. Under those conditions a master with a large passenger list, would not have very much time to attend to trying to stop up a hole at the bottom?

A. When I went alongside of her, at that time, he could not have got at the hole.

Q. He could not have got at it at all?

A. No, sir.

Q. How long was that after the collision?

A. I should judge about 15 or 20 or 25 minutes; somewhere along there.

Q. In your judgment, as a shipmaster, from what you saw there of the conditions and surroundings, do you think it would have been practicable for him to have stopped that hole, having in mind his duties to his passengers, and to those on board, and the listing that you noticed. Do you think it would have been a practicable thing for him to have stopped up the hole?

A. I do not think he could have stopped the hole. I think he could have got her on a shoal, where she would not have sunk so fast.

Q. That is the only thing, that he might have got her on to a shoal. That is what he was attempting to do?

A. He was trying to do that, but he did not go towards any shoal.

(Testimony of Horace Strother.)

Redirect Examination.

Mr. LEVINSKY.—Q. Did you see the vessel the next two or three or four days after that?

A. I saw her Saturday morning when we left her, and I saw her Sunday night.

Q. You saw her practically every other day for a long time?

A. Every other day for several days. I saw her several times.

Q. When they started work on her, was she in the same place as where you left her?

A. No, sir.

Q. Where was she?

A. Right across the river in a deep hole.

Q. How far away?

A. I don't know how far it was in feet. She was over pretty near the opposite bank.

Q. How far from where you left her?

A. I should judge between 700 and 1,000.

Q. Was she erect or keeled over?

A. I could not tell. All I could see was just a few feet of the smokestack.

Q. If any anchors had been put out where you left her, would she had floated into this deep water?

A. It would depend whether the anchor would have held her or not.

Q. What do they keep anchors on a boat for?

A. To hold them.

Q. Which was the safest and most expedient method, to leave her without any anchors, or cast anchors?

(Testimony of Horace Strother.)

A. The proper thing to have done would have been to try and make that boat fast to that bank, whether they did it with lines, or buried dead men in the bank, or cast out anchors.

Q. If either of those things had been done, would she have floated out to where she was?

A. If done, in such a way as to hold her, she would not have.

Q. I mean done in the ordinary way of doing those things.

A. I think it would have held her there.

Q. Was it a proper way to leave a vessel in that depth of water, or make her fast, or attempt to make her fast by throwing out an anchor?

A. It was not a proper thing to do, to say the most, to leave her in that way.

Recross-examination.

Mr. FRANK.—Q. If you consider it was not a proper way to leave her, and you knew your boat had done the injury, why did you not take some steps to see she was properly anchored?

A. Because there was a captain in command of the "Dauntless" and I offered him any assistance he wanted. I did not leave the boat until he told me I could not do anything more than to put him on another passenger steamer.

Q. I am not speaking of that boat. You say you went up and down there for 3 or 4 days afterwards. Did you report it to your people that she was likely to go out into deep water.

(Testimony of Horace Strother.)

Mr. LEVINSKY.—Objected to as wholly irrelevant and immaterial, and not cross-examination or part of his duty.

A. We all talked about what a shame it was to leave her down there without doing anything.

Mr. FRANK.—Q. And none of your people went down to do anything to her?

A. Not that I know of.

Q. Are you positive that in the 3 or 4 days that you speak of, she had left her position on the slope of the bank and gone 700 feet out into the water. Stop and think for a minute. Try to recall it I know it is a long time ago, and you may possibly have made a mistake. See if you can recall it, whether you have made a mistake or not.

A. That she went from the shoal and drifted 700 feet?

Q. Yes, in 3 or 4 days.

A. I think it is all of that.

Q. You think it is? A. Yes, sir.

Q. Do you think it was within 3 or 4 days, or was it not a very much longer time after they had been pulling or hauling at her?

A. She went out into this hole before any other boats had pulled on her.

Q. Do you think she was submerged and nothing but her smokestack out when they started to work to raise her?

A. When I saw her she had her smokestack out, and several times when I went by I could not see anything of her at all. I could just see a schooner.

(Testimony of Horace F. Strother.)

Q. A schooner?

A. Yes, sir; there was a schooner anchored right over the spot for a few days. She was in this position before they started to work on her to raise her.

(An adjournment was here taken until to-morrow, Saturday, November 16th, 1907, at 10 A. M.)

Saturday, November 16th, 1907.

HORACE F. STROTHER, recalled for petitioner, sworn.

Mr. LEVINSKY.—Q. State whether or not you knew the steamer "Dauntless"? A. I did.

Q. What would you say was a reasonable valuation of the steamer "Dauntless" just before she met with the collision?

A. Do you mean what she would sell for?

Q. Yes.

A. I don't think she would bring more than $25,000.

Q. Do you think she would have brought $25,000?

A. I think that would be an outside price for her.

Mr. LEVINSKY.—That is all.

Cross-examination.

Mr. FRANK.—Q. Captain, what was the "Mary Garrett" worth at that time?

A. The "Mary Garrett," she was worth about $15,000 or $16,000.

Q. I presume, Captain, your entire experience has been confined to navigating vessels?

(Testimony of Horace Strother.)

A. To navigating them, as well as taking care of them.

Q. That is all you know, and that is the only foundation you have for your judgment as to the values?

A. Well, of course, I know pretty well what the values of boats are, you know, from sales, and what they cost, and so on.

Q. How, by rumor? You never dealt in any boats, did you? A. No, I never dealt in any.

Q. You never bought or sold any boats, or built any boats, or anything of that sort?

A. No, sir.

Q. Just a kind of rumor?

A. The general idea that steamboat men get from being around.

Redirect Examination.

Mr. LEVINSKY.—Q. Did you believe the "Mary Garrett" was worth $32,000? A. No, sir.

Q. As a matter of fact, it was quite common talk among the steamboat men after she was appraised, was it not?

Mr. FRANK.—That is all finished. That is not a proper question to ask.

Mr. LEVINSKY.—You went into it.

Mr. FRANK.—The only purpose of asking it on my part was to get a line on the judgment of the witness.

The COMMISSIONER.—That is not a proper question to ask.

(Testimony of Henry Potvin.)

Mr. LEVINSKY.—We reserve an exception. That is all.

[Testimony of Henry Potvin, for Petitioner.]

HENRY POTVIN, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What is your full name?

A. Henry Potvin.

Q. What is your occupation?

A. Pilot on the steamer "General Frisbie."

Q. Do you hold a pilot's and master's license?

A. Yes, sir.

Q. How long have you been engaged in the steamboat business?

A. Since 1880; since 1886, I have been a licensed officer.

Q. Did you know the steamer "Dauntless"?

A. Yes, sir.

Q. At the time of the collision between the "Dauntless" and the "Mary Garrett," by whom were you employed?

A. By the Union Transportation Company.

Q. The owner of the "Dauntless"?

A. Yes, sir.

Q. What boat were you navigating at that time?

A. I was on the "Columbia."

Q. Did you go up that night of the collision from San Francisco?

A. No; I was on my way down that morning.

Q. Did you arrive at the scene of the wreck?

A. Yes, sir.

(Testimony of Henry Potvin.)

Q. Was the "Mary Garrett" then attached to the "Dauntless"? A. Yes, sir.

Q. Do you know where the "Dauntless" was at that time?

A. She was lying, I should judge, a quarter of a mile below Bradford Bend.

Q. Did you see the "Dauntless" the next day or a day or two afterwards?

A. I believe I saw her, but I didn't pay much attention to it, or I have forgotten the exact position she was in at that time.

Q. I will ask you to state whether or not she was about the place where you saw her the night or morning of the collision?

A. No. I believe she had drifted down in the stream.

Q. Do you know the time they commenced work on the "Dauntless"?

A. I don't know just exactly what time.

Q. I don't care particularly to fix the date, but about the time when they did begin?

A. Yes; I think I have a recollection of them going down to raise her with some barges.

Q. Where was the "Dauntless" then with reference to where she was when the "Mary" had left her?

A. She was submerged entirely; she was lying out, I believe, I should judge between Kentucky Landing and Three Mile Slough.

Q. I mean how far away from where she originally was?

(Testimony of Henry Potvin.)

A. Well, I should judge it must be in the neighborhood of a mile.

Q. State whether or not, if the "Dauntless" had been anchored at the time the "Mary Garrett" left her, she would have drifted down to where she was in deep water in this place a mile away.

A. I don't think she would, that is, if they had lines out or properly anchored.

Q. What would you say the value of the "Dauntless" was at the time of the collision—just before the collision?

A. Well, that is a matter that is pretty hard for me to state; from the statements of the other boats that been sold I should judge probably $25,000.

Q. Would you consider that an outside figure?

A. Yes, sir; that is, taking into consideration the sale of the other boats.

Q. I show you a photograph and ask you to state whether or not that is—

Mr. FRANK.—Ask him what it is.

Mr. LEVINSKY.—He has never seen it before.

Q. I show you that photograph and ask you to state whether or not that represents the position and condition of the steamer "Dauntless" at the time you saw her the next day after the wreck?

A. Somewhat that position. That is, she was submerged that morning that I came down to about the extent, I should say, of her hurricane deck.

Q. Does that seem to be a correct photograph of the steamer? A. Yes, sir.

(Testimony of Henry Potvin.)

Mr. LEVINSKY.—We offer the photograph in evidence and ask that it be marked "Petitioner's Exhibit No. 1."

(The photograph is marked "Petitioner's Exhibit No. 1.")

Cross-examination.

Mr. FRANK.—Q. Captain, when was it that you first saw her in this condition?

A. When I saw her in that condition, it must have been about 5 o'clock that morning of the collision; that is as near as I can recollect.

Q. Had the "Mary Garrett" left her yet when she was in that condition?

A. No, sir. When I saw her, the "Garrett" was alongside of her.

Q. How long did you remain there?

A. I remained there only a few minutes.

Q. And went right on?

A. Yes. Well, I went within a certain distance and some one hollered for the steamer not to approach them, that I couldn't be of any help to them.

Q. Then you went on your business to the city?

A. Yes.

Q. You don't know what occurred afterwards?

A. No, sir.

Q. How long was it before you next saw the vessel?

A. Well, I saw her in the evening coming up that same day again; that is, we could see the lights on her.

Q. See lights on her?

(Testimony of Henry Potvin.)

A. Yes—see the outlines of her. You could see the outlines of her in the night, just about that position for a day or so.

Q. But you don't know what caused her to change her position?

A. No, I don't, except it must have been the current, the tide.

Q. That is only an inference? A. Yes, sir.

Q. Of your own knowledge, you know nothing about it? A. No.

Q. Did you ever go on board of the vessel?

A. No, sir.

Q. All you observed was this, however: you saw her a few minutes that morning—

A. Yes, sir.

Q. And other times passing in the night-time you saw lights on her? A. Yes, sir.

Q. So, really, the details of her position and what would have been necessary to retain her there, are matters that you don't know anything about, after all? A. No, sir.

Q. How she could have been anchored, or how she could have been fastened, or those things, you never took any observation?

A. I don't know how they made fast her anchor, no. Of course, as to my judgment as to what should have been done is a different thing.

Q. Well, in order to form a judgment on that, you would have to have a more particular knowledge of the conditions, wouldn't you?

(Testimony of Henry Potvin.)

A. Well, I would think this way, as far as I know, that if she had been fast she certainly would have held.

Q. In other words, if she had been sufficiently fast not to move she would not have moved? Is that not it? A. Yes, sir.

Q. What would have been necessary, or how much would have been necessary to retain her in that position you can't tell, because you don't know what her position was? A. Not at that time, no.

Q. Now, with respect to the value of the "Dauntless," I understood you to say that you know nothing about values except you are judging from statements made from what the others boats sold for?

A. Yes.

Q. That is, what the "Columbia" and "Weber" sold for? A. Yes.

Q. And that is all you know anything about it?

A. That is all I know about it.

Q. And the conditions under which the "Weber" and the "Columbia" were sold, you don't know anything about that, either? A. No, sir.

Q. You don't even know the prices that they sold for, except from hearsay? A. That is all.

Q. That is the only basis you have for your judgment in this matter? A. Yes, sir.

Redirect Examination.

Mr. LEVINSKY.—Q. How long had you been going by Bradford's prior to the time of the collision? A. Before that?

Q. Yes. A. A number of years.

(Testimony of Henry Potvin.)

Q. You knew the conditions, and the shoals, and the banks, and the tides, and everything at Bradford's long before the collision? A. Yes, sir.

Q. And with that knowledge on your part, do you believe if that vessel had been anchored or a line put out, she would have held and not drifted into deep water? A. Yes, sir.

Mr. FRANK.—Do not lead the witness.

Mr. LEVINSKY.—I do not think I am.

Mr. FRANK.—You certainly are leading him.

Mr. LEVINSKY.—Q. Do you know what is a fair allowance for depreciation in the value of vessels each year, in your opinion?

A. Really, not being an owner in the lines or in steamers, I never placed any figure on that; I never figured on that. Consequently, I would not be doing any one justice by saying so. I would rather not say.

[Testimony of Arthur Robinson, for Petitioner.]

ARTHUR ROBINSON, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What is your business, Mr. Robinson?

A. Master and pilot of steam vessels.

Q. What vessel are you employed on at the present time? A. The steamer "Claremont."

Q. Of what company?

A. San Francisco, Oakland & San Jose Railroad Company.

Q. How long have you been employed by that company? A. 3½ years.

(Testimony of Arthur Robinson.)

Q. Do you hold a pilot's license? A. Yes.

Q. Master's license? A. Yes, sir.

Q. Did you know the steamer "Dauntless"?

A. Yes, sir.

Q. At the time of the collision between the steamer "Dauntless" and the "Marry Garrett," by what company were you employed?

A. I was employed by the Navigation Company—the California Navigation and Improvement Company.

Q. Were you on a trip the night or morning of the collision? A. Yes, sir.

Q. Where were you coming from?

A. I was coming from Port Costa to Stockton.

Q. What steamer did you have with you?

A. The steamer "Mary."

Q. Did you reach the scene of the accident or collision? A. I passed by.

Q. What time? A. About 9 o'clock.

Q. About 9 o'clock on the morning of the collision? A. Yes, sir.

Q. Did you see the steamer "Dauntless"?

A. Yes, sir.

Q. I show you a photograph marked "Petitioner's Exhibit No. 1," and ask you to look at it (handing). A. Yes.

Q. What is that a representation of, in your opinion? A. That is her.

Q. What? A. That is the "Dauntless."

Q. Is that the position she was in when you saw her about 9 o'clock on the morning after the collision? A. Yes, sir.

(Testimony of Arthur Robinson.)

Q. How far was it from the stern of that vessel as she lay there to the shore at Bradford's?

A. Well, it is about a half a block, about 150 feet.

Q. How long had you been going by Bradford's in that place where the "Dauntless" was prior to the time of the collision—how many years?

A. About 5 years.

Q. Did you know Bradford's shore?

A. Yes, sir.

Q. Did you know the tides and shoals there where the "Dauntless" was at that time?

A. Yes, sir.

Q. State whether or not, in your opinion, if the "Dauntless" had been anchored at the place she was, as shown by the photograph, or her line taken ashore, whether she would have slid into deep water.

Mr. FRANK.—I would like to have it understood that all the line of questions is subject to my objection as immaterial. I have not been noting them as we have been going along, but the objection is reserved.

Mr. LEVINSKY.—Our contention is that if you want to make an objection, you must make it after the question is asked. If a question has been passed without objection, you cannot reserve an objection to it—to a question that is already answered.

Mr. FRANK.—I wish to have it appear that I reserve an objection to all that line of examination.

Mr. LEVINSKY.—Q. Answer the question. Read the question, Mr. Reporter.

(The last question was read by the Reporter.)

(Testimony of Arthur Robinson.)

A. I think she could have been held there with proper tackle; one anchor might not have held her, but there are different ways known to steamboat men to do it.

Q. I will ask you to state.

A. Yes, she could have been held, in my judgment.

Q. I will ask you to state whether or not you went down to the place where the "Dauntless" was after that time, and with whom did you go?

A. I went with Mr. Don.

Q. Robert Don? A. Yes.

Q. What steamer did you take?

A. The "McDonald."

Q. Who did she belong to?

A. The C. N. & I. Company.

Q. Under whose instructions were you working while you were there? A. Mr. Gillis'.

Q. When did you go down there?

A. I can't remember the date.

Q. About when?

A. About the latter part of September.

Q. Of 1901? A. Of 1901.

Q. When you went down there was the "Dauntless" in the same place as shown in this picture?

A. No, sir.

Q. How far from that place was she?

A. I should judge about a mile or three-quarters of a mile—a mile, I think.

Q. State whether or not she was in the position as shown by that photograph, or not.

(Testimony of Arthur Robinson.)

A. All I could see of her at that time was the top of her mast; she was submerged.

Q. How long did you remain there from the time you went down on the "McDonald," with Mr. Don?

A. About three months. I have no memorandums; it must be a matter of record.

Q. Who was doing the work at that time of raising her? Who was in charge?

A. Well, Mr. Don was in charge when I first went there.

Q. Under whose direction was he working, if you know? A. He was under Mr. Gillis' orders.

Q. Now, do you remember any occasions when the lines were removed from the place they had been fastened during the time that this attempted raising was going on, and while you were there?

A. Well, there was lots of times Mr. Gillis would come around and slack up the lines and throw off lines, that really, we thought, was detrimental to the progress of the work; that is, he was undoing what we would be working to do.

Q. Give an illustration of that, an example of that.

A. Well, we had an anchor out ahead there one time to a barge, had out one barge and an anchor out ahead of the other one, and there was a pretty good strain on both of them, and he comes out there while we were aboard of the steamer or something, and I happened to see him out there; I didn't know what he was doing, but afterwards when we got out there we found this line all let go; and afterwards I asked

(Testimony of Arthur Robinson.)

him, "What did you let that line go for"? and he called me down, and said he was bossing that job.

Q. What was the effect of casting off that line?

A. Well, it caused the barges to sheer sidewise with the tide, and brought a heavy strain on the chains that were underneath the "Dauntless" it let the strain go on the chains that went down on the side of the barges, they had a strain on then; those lines that we had ahead were to hold those barges right in place alongside of the steamer; when you slacked up or let go one of those lines that were holding the barges and a strong tide is sweeping the barges and the boat is resting on the bottom of the river, the current on the barges sags them back and lets the duty of holding the barges there rest on the chain underneath there.

Q. What effect does it have on the progress of the work?

A. Well, we couldn't heave in by the chains any more until we got the anchor out again and pulled the barges back into place.

Q. What amount of time would that take?

A. That would take another tide.

Q. What length of time would that be?

A. There are two tides a day, 24 hours, two flood tides; approximately that would be 12 hours.

Q. Did you have to replace that rope from the place where it was taken off the anchor?

A. We would have to replace that or put another one out.

Q. Did that occur on more than one occasion?

(Testimony of Arthur Robinson.)

A. Oh, no, but in regard to chains we had underneath it—

Q. What about the chains you had underneath?

A. I can remember one instance; of course, I can't remember all of them. But we had the chain over down on the side of the steamer and up on the other side the end was almost to the top of the water; there was a shackle there, where it was shackled on to a line, and the shackle became unfastened, and after being under the boat this end of the rope dropped down to the bottom. Well, of course, it was not my judgment to pull it out, but he insisted on us, after having that underneath the boat, insisted on us hauling it all the way out, where I wanted to send the diver down and leave him pick up that end where it was loose there right where it fell into the mud and run a shackle around it, but he had it hauled up.

Q. You said "he." Who do you mean by that?

A. Mr. Gillis.

Q. Now, on the occasion when these lines were cast off, was it on occasions when you were working or was it on occasions when you were away on the boat doing something else?

A. Well, we would be up on the job somewhere around there on the steamer or on the barge or somewhere; he was going around by himself.

Q. Who do you mean by "he"?

A. Mr. Gillis.

Q. I will ask you to state whether you remonstrated with Mr. Gillis on different occasions about these matters and things?

(Testimony of Arthur Robinson.)

A. I spoke to him several times but he informed me that it was none of my business, he knew what he was doing, which I had to agree with, he was my boss.

Q. Did you ever speak to Mrs. Gillis about it?

A. I did.

Q. What did you say to her?

A. Well, I spoke to Mrs. Gillis lots of times in regard to it. The principal idea that I wanted to convey was I wanted to get Mr. Gillis to stay up in Stockton. I wanted her to try and keep Mr. Gillis away.

Q. Why?

A. Well, I thought we could get along better if he wasn't there.

Q. Faster? A. Faster.

Q. What did Mrs. Gillis reply?

A. Well, she always told me—

Mr. FRANK.—I suppose this is all very entertaining. If you gentlemen think it has any bearing upon the amount of damages, you are welcome to it.

Mr. LEVINSKY.—We certainly do, or we would not ask the questions.

Q. What was Mrs. Gillis' reply?

A. Well, she always told me that Mr. Gillis knew what he was about, and that I did not understand Mr. Gillis.

Q. Anything said about Mr. Gillis' motives or reasons? A. No.

(Testimony of Arthur Robinson.)

Q. What, if anything, was said about Mr. Gillis being President of the old line, the California Navigation & Improvement Company.

Mr. FRANK.—Now, let us get down to what is right and reasonable; if it is at all material, we are entitled to the time, circumstances, and those who were present.

Mr. LEVINSKY.—Q. Who was present at any conversation between you and Mrs. Gillis?

Mr. FRANK.—When was it?

The COMMISSIONER.—Fix the time.

Mr. LEVINSKY.—Q. Now, state about when and where it was, and who, if any one, besides you and Mrs. Gillis were present, at any conversation that may have occurred about Mr. Gillis becoming President of the old line known as the California Navigation and Improvement Company.

Mr. FRANK.—What has that to do with the question here. I object to it as being immaterial. I fail to see any connection at all between that and these damages. If it has any connection, counsel can state how he expects to connect it.

Mr. LEVINSKY.—We claim this, that if proper steps had been taken at the start, the damage would have been very slight; that we were not responsible for the conduct and judgment of Mr. Gillis or the reasons why he did not have the vessel raised at an earlier time or attempt to do so. We are not liable for that, and it may be that this question may give a motive or reason.

(Testimony of Arthur Robinson.)

Mr. FRANK.—May give what?

Mr. LEVINSKY.—May show a motive or reason for it.

Mr. FRANK.—What motive or reason?

Mr. LEVINSKY.—We do not have to explain that.

Mr. FRANK.—Go on.

Mr. LEVINSKY.—Q. Answer the question. Read the question, Mr. Reporter.

(The last question was read by the Reporter.)

A. At one time in a private conversation with Mrs. Gillis—

Q. Where was it?

A. On board the "McDonald."

Q. During the time that you were down there working?

A. Some time while we were down there.

Q. Anybody present besides yourselves and Mrs. Gillis?

A. No. She asked me good naturedly if it would surprise me if Mr. Gillis was President of the Navigation Company.

Q. Within what time? A. Within a year.

Q. Was that at a time when you were remonstrating with Mrs. Gillis in regard to the manner in which Mr. Gillis was doing the work down there?

A. That was right after a little talk we had in regard to Mr. Gillis.

Q. In connection with the work?

A. Yes, in connection with getting him to go back to Stockton and leaving us alone.

(Testimony of Arthur Robinson.)

Q. Now, what effect, if any, did the casting off of these lines or the dropping of these lines or chains, or the hauling of them up have upon the woodwork, the upper works of the "Dauntless"?

A. The "Dauntless" was under water then, and I could not, I would not be able to tell.

Q. I will ask you to state, if you know, whether the hog chains of the "Dauntless" were cut, and, if so, by whom?

A. Well, they were unfastened; they might have been; most of them could have been let go by unscrewing them, unbuckling them.

Q. Were they? A. Yes.

Q. The turn-buckles had been unscrewed?

A. They were unfastened, unscrewed, slacked up.

Q. Do you know by whom?

A. By the crew there, the workmen.

Q. The workmen there who were working under the direction of—

Mr. FRANK.—Do not lead the witness. We have got enough of this stuff, but just let the witness tell it. He can manufacture it fast enough without your aid.

Mr. LEVINSKY.—We object to the word "manufacture." We think it is an insult.

Mr. FRANK.—I shall use such language as I see fit.

Mr. LEVINSKY.—I do not think it is proper, and you know it.

Mr. FRANK.—Well, I have my views of this entire thing.

(Testimony of Arthur Robinson.)

Mr. LEVINSKY.—People have their views with you, which they don't express.

Mr. FRANK.—I have a right to express myself; some of these things are so ridiculous and absurd.

Mr. EELLS.—I do not like to interrupt these comments, but I say they are entirely out of place. The witness is entitled to protection, and the idea of counsel undertaking to characterize statements as ridiculous and absurd is out of place I think.

The COMMISSIONER.—I think the criticism is more on the attorneys than the witness. If he wants to use that language, I suppose he is privileged to do so. It goes into the record; he can have it in.

Mr. FRANK.—You have all expressed your opinions. I suppose we can go ahead now.

Mr. LEVINSKY.—Read the question, Mr. Reporter.

(The last question was read by the Reporter.)

Mr. LEVINSKY.—I will withdraw that.

Q. Under whose direction were this crew of workmen working?

A. We were all under the direction of Mr. Gillis when we went down there; that was my instructions from the company.

Q. Now, did you have any conversation with Mr. Gillis—I will withdraw that—what effect did the loosening of these hog chains, these buckles that you have testified to, have upon the "Dauntless"?

(Testimony of Arthur Robinson.)

A. Well, the immediate effect would be to let her sag out of shape; that is all that holds the boat in shape.

Q. Well, now, in sagging out of shape, what effect would that have on her upper works, as you call it? A. Well, it would make them crack.

Q. What effect would it have on the frame?

A. The frame and the upper works would go out of shape with the hull.

Q. And what effect would that have, that going out of shape. State whether or not it would tear them or remove them from the hull?

A. Well, it would loosen them, weaken them.

Q. State whether or not the boat could have been raised without loosening those chains?

A. That would simply be asking my opinion; the only answer I could give to that would be according to my opinion.

Q. Give your opinion.

A. Well, of course, it could be done another way. You couldn't do it that way, but it could be done.

Q. Had the loosening of the chains anything to do with the raising of the boat, if the boat were being raised in a proper manner?

A. You say, would the loosening of the chains have anything to do with the raising of the boat, if she were raised in the proper manner?

Q. By that I mean, could that boat have been raised in another manner without loosening those chains?

(Testimony of Arthur Robinson.)

A. I think so—in my estimation, in my judgment.

Q. Now, when you went down to the wreck—

A. The "J. D. Peters" was raised that way.

Q. Raised by loosening the chains?

A. Without it.

Q. When you went down to the steamer "Dauntless" on that occasion, state whether or not Mr. Gillis was on board the "McDonald" when you went down?

A. When we left Stockton? When I left Stockton with the "McDonald" I went down with the barges.

Q. Was he on board?

A. I can't remember whether he was on board, or not.

Q. Did you see him then there or did you see him after you arrived? A. Yes, sir.

Q. Did you have any conversation with Mr. Gillis about the length of time that had elapsed before he attempted to raise the "Dauntless," and if so, what was his answer?

A. Yes. I asked him why they had not got at that before.

Q. Why they had not got at what?

A. Why they had not got at it before—why they had not started to raise her before.

Q. What was his answer?

A. He told me that he did not think it was up to him, that it belonged to the Navigation Company.

(Testimony of Arthur Robinson.)

Q. What, if anything, did he say about when his boat was struck by the "Mary Garrett"?

A. That was a little conversation we had. He said, as I remember it, "My boy, when the 'Garrett' touched my boat, the 'Dauntless' belonged to the Navigation Company."

Q. State whether or not that was the reason he gave why he had not started to work sooner?

A. This came right after my asking him why he had not started in on that work before.

Q. Now, state whether or not there was much mud had accumulated in the "Dauntless" by reason of her drifting and floating around?

A. Oh, everybody knows that. Shucks, there was lots of mud in her.

Q. State whether or not you called Mr. Gillis' attention to that? A. Yes, sir.

Q. What did you suggest and tell him?

A. I told him to play the fire hose in there and wash it out of the rooms, as she came above the water; as soon as we could get into the rooms, I wanted to take the fire hose and sluice it out.

Q. What did he say?

A. The same old thing, that he was doing it.

Q. What effect, if any, did this mud, the weight of this mud, have on the woodwork and upper works of the "Dauntless"?

A. It increased the weight.

Q. Increased the weight of what?

A. Of the vessel.

(Testimony of Arthur Robinson.)

Q. Did it make it easier or heavier to raise by reason of that?

A. Made it a good deal heavier.

Q. Now, with these hog-chains loosened, as you have testified to, and this heavy weight of mud in the "Dauntless," what effect did it have upon the upper works?

A. Well, it would have the effect to help to crush her, that is, to cave her in.

Q. Now, do you remember when the "Dauntless" was finally raised?

A. I don't remember, but I was there.

Q. I mean the occasion? A. Yes, sir.

Q. What steamer was expected to take the "Dauntless" to Stockton?

A. We was expecting the "Columbia."

Q. Owned by Mr. Gillis' company?

A. The Union Transportation Company.

Q. What steamer did take the "Dauntless" to Stockton? A. The "McDonald."

Q. Owned by the California Navigation and Improvement Company? A. Yes, sir.

Q. Did you have any conversation with Mr. Gillis as to why he wanted the "McDonald" or why he had the "McDonald" take the "Dauntless" to Stockton, instead of having her taken by the "Columbia"?

A. Well, he said it would look better.

Q. Did you have a conversation?

A. Yes, sir.

(Testimony of Arthur Robinson.)

Q. What did he say to you?

A. He said it would look better to have the "McDonald" tow her up.

Q. Did he give you any reason why?

A. Well, he said it was a Navigation Company boat, meaning the "Dauntless," and it would look more like the Navigation Company's boat if the company's own boat, meaning the "McDonald," towed her up.

Q. What did he say, if anything, about what he would do when she was landed at the shipyard?

A. He would go to the office and get his money.

Q. What office?

A. The Navigation Company—he didn't say what office.

Q. What did he say? Give us, as near as you can, the entire conversation as to what he said, or his language about when the "Dauntless" was landed at the shipyard at Stockton, whose boat she would be and where he would go, and what he would do?

A. I asked him where he was going to land her, and he said he was going to put her over at the shipyard; there was only one shipyard there; and he says, "That is all I have to do; then I will go to the office in the morning and get my money for her."

Q. What did he say, if anything, about what he would tell them as to whose boat was there?

A. He says, "I will tell them there is their boat."

Q. And that was the shipyard of the California Navigation and Improvement Company?

(Testimony of Arthur Robinson.)

A. Yes, that was the shipyard—that was the only large shipyard there.

Q. Did you examine the "Dauntless" for the purpose of ascertaining whether there were any marks of the "Garrett's" *stesm* on her hull or where any guard was broken, or where it was broken?

A. Yes.

Q. How did you come to do that?

A. Because I heard talk about the "Garrett" ramming her after the collision, and I wanted to see where she had struck.

Q. Did you find any marks of the "Garrett's" *stesm* on her hull?

A. Not outside of the hole that she made during the first collision.

Q. Now, did you find any guard broken on the "Dauntless"?

A. The guard was all broken in there, all knocked off.

Q. State whether or not it would have been possible for the "Garrett's" guard to have reached the hog posts or guards that were broken?

A. The "Garrett's" guard could not have reached into the hog posts, no.

Q. State whether or not it would have been possible for the guard to have broken those posts that were broken? A. I don't see how.

Q. In your opinion, how did the guard of the "Dauntless" become broken?

Mr. FRANK.—Well, now, I object.

(Testimony of Arthur Robinson.)

A. In my opinion—

Mr. FRANK.—One moment. I object to that. This man was neither there at the time of the collision nor at any time afterwards, and did not see this until she was finally raised. We are going very far afield in getting suggestions and opinions of persons who have no foundation for the opinions. I object to it as incompetent and immaterial, and no proper foundation for it.

The COMMISSIONER.—That question has been decided by the Court.

Mr. LEVINSKY.—No. They brought out, Mr. Commissioner, some testimony of the Captain of the "Dauntless" yesterday—

The COMMISSIONER.—I would like to know what the object is of all of this testimony. I am sure I cannot understand it. It seems to me, as Mr. Frank has said, you are both going very far afield. If the idea is to bring out testimony that Mr. Gillis or his company did deliberately wreck or add to the wreck of the boat after she had been sunk by the "Mary Garrett" for some ulterior purpose, and if that should have any bearing upon the damages in this case, of course it is admissible and pertinent; otherwise I cannot see what it is for.

Mr. LEVINSKY.—Mr. Commissioner, out contention is that we have a right to show that for the very purpose that you have mentioned—

The COMMISSIONER.—I had surmised that that might be the reason for all that testimony. That

being so, if it has any bearing upon the question of damages in this case, why, it would be admissible. I cannot see now how it can be. Of course, if there is any answer that would have any tendency whatever to show the damages at that time, why, we want to know it, we want to hear it, and find out what the damages were. For that reason, you can, of course, ask almost any question to find out and it is admissible for that purpose; of course, hearsay could not go in under any circumstances unless you both wanted it.

Mr. FRANK.—I have not taken very much pains to limit the examination, but there are some things that go so far that it does exhaust my patience.

The COMMISSIONER.—Let us have patience on both sides, and go ahead.

Mr. FRANK.—My objection to this is that it is calling for the opinion of the witness and no foundation laid.

The COMMISSIONER.—I suppose this whole question is a matter of opinion as to the value or damages.

Mr. FRANK.—This is calling for an assumption by the witness. Of course, we can all express our opinions on almost anything, and sometimes we do in a most unwarranted manner, but they would not be accepted as evidence in a serious investigation of any kind.

Mr. LEVINSKY.—Yesterday, if you remember, Mr. Frank brought this matter out, the testimony of

(Testimony of Arthur Robinson.)

the captain of the "Dauntless" as to whether we did not break the guard rails or posts or something.

Mr. FRANK.—What has that to do with this, his assumption?

The COMMISSIONER.—I cannot see what it has to do with this myself. Parties ought to have, and generally do have, a reason for asking questions. They do not ask these questions—

Mr. LEVINSKY.—We are not asking this question simply to delay matters.

The COMMISSIONER.—I do not suppose either side is doing that. I suppose the better way to do is to let it be answered and let it go in.

Mr. LEVINSKY.—We reserve an exception.

Q. Did you examine the "Dauntless" after she was raised? A. Yes.

Q. Were any of her upper works in place?

A. Some of it was.

Q. Did you examine the place where she was struck. A. I did.

Q. How far below the water line did that extend?

A. The point of it was about a foot and a half under water.

Q. About how wide was it at the water line?

A. About two feet, I should judge—I don't know exactly.

Q. Was it any wider than two feet?

A. I don't think it was.

Q. And it ran in a V shape, did it not?

A. Yes, it was a V shape.

Q. It ran down to a point? A. Yes.

(Testimony of Arthur Robinson.)

Q. State whether or not, in your opinion, that hole could have been stopped or the "Dauntless" prevented from sinking, and if so, how?

Mr. FRANK.—The same objection. He was not present and does not know the circumstances and conditions, and there is no foundation laid for it.

The COMMISSIONER.—I suppose it is intended as a hypothetical question put to this witness as an expert.

Mr. FRANK.—It is, but there is no foundation laid for it, the facts and circumstances. You don't need to ask this witness or anybody else, if you have a hole in something, and everything is propitious, you can stop up the hole, but whether that thing could have been stopped up at that time or under those circumstances is another matter.

The COMMISSIONER.—I do not think it would aid me very much in ascertaining the amount of damages. It might, but I don't think so. Of course, if the attorneys think it will, let it be answered.

Mr. LEVINSKY.—We would like to have the answer.

Mr. FRANK.—We will note an exception.

Mr. LEVINSKY.—Read the question, Mr. Reporter.

(The last question was read by the Reporter.)

Q. Do you understand the question?

A. Yes, but it is such a long thing to describe.

Q. Start in.

A. I might not—I was not there the night of the accident.

(Testimony of Arthur Robinson.)

The COMMISSIONER.—If you cannot answer it, say so. That is perhaps the quickest way.

Mr. LEVINSKY.—Q. If you can answer it, please do so, and if you cannot, say you cannot?

A. I cannot answer that; I was not there.

Q. Mr. Robinson, how long did you know the "Dauntless"?

A. About 9 or 10 years—9 years, I guess.

Q. You had been on her, had you?

A. As a passenger.

Q. Had seen her?

A. Oh, yes. I was well acquainted with her.

Q. With what? A. With the boat.

Q. What would you say a reasonable value of the steamer "Dauntless" was just before the collision?

A. I think that she would be valued between $20,000 and $25,000.

Q. State whether or not you consider $25,000 an outside figure? A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. This figure of $20,000 to $25,000, you have discussed with the other witnesses outside and Mr. Levinsky, have you not?

A. We have talked about the value of the boat for the last—ever since the accident happened.

Q. Who have you been talking with ever since the accident happened?

A. I have talked with Mr. Levinsky; I have talked with Captain Strother; I have talked with Mr. Roach; I have talked with Captain Brooks; I

(Testimony of Arthur Robinson.)

have talked with hundreds of men; I have talked with men at home—this has been the talk all over the beach.

Q. You have had it on your mind all the time since the accident?

A. I have not had it on my mind all the time, no; it has been several years now.

Q. How did you happen to be so very interested in it? Are you in the employ of the company?

A. No, sir.

Q. How long is it since you were in the employ of the Improvement Company?

A. Well, I don't know; I think that was pretty near the last job I had for them. I have no love for the Improvement Company, either.

Q. You have no love for them?

A. I could not get steady work for them; it is a well known fact, up there in Stockton.

Q. You have some particular love for Mr. Gillis, though?

A. I have no particular love for Mr. Gillis.

Q. You have had difficulties with Mr. Gillis in this connection, had you not?

A. What is that?

Q. You had difficulties with Mr. Gillis in this connection, did you not?

A. I finished the job we had.

Q. Didn't you have difficulty with Mr. Gillis?

A. When do you mean?

Q. Were there not several occasions in which you were locked in your room during this operation.

(Testimony of Arthur Robinson.)

A. No, sir.

Q. You were not? A. No, sir.

Q. Were there not several occasions when you were incapacitated by reason of liquor during this time? A. No, sir.

Q. You are positive of that?

A. I am positive of that.

Q. There was no controversy between you and Mr. Gillis concerning your being drunk during the time you were doing this work? A. No, sir.

Q. And you say you were not confined?

A. Mr. Gillis never told me I was drunk or never said anything about it.

Q. But weren't you drunk? A. No, sir.

Q. You were not drunk during this operation at all?

A. No, I will say that I drink liquor, and I take a drink once in a while.

The COMMISSIONER.—What has that to do with this?

Mr. FRANK.—It has a great deal to do with this.

The COMMISSIONER.—The only question is whether he was friendly or unfriendly to Mr. Gillis. You have no right to go into side issues.

Mr. FRANK.—I take issue with the Commissioner upon that. I have a perfect right to go into the conduct of this man who has come here and attempted to testify to the acts and conduct and conversation of a man he knows is dead, and show the conditions and motives for his actions, and I think it perfectly competent.

(Testimony of Arthur Robinson.)

The COMMISSIONER.—Well, you have got it all out, now, any way.

Mr. FRANK.—I am not done with it. That part is out, but I am not done with it.

Q. When you went down there, who sent you down?

A. The Navigation Company.

Q. What instructions did you have?

A. I was to follow Mr. Gillis' orders.

Q. Follow Mr. Gillis' orders?

A. Obey Mr. Gillis, and obey Don's orders—it was understood that Bob Don—

Q. Then you had no control or no discretion in regard to this job? A. I had no discretion.

Q. And therefore, Mr. Don was the man who was doing the raising. Is that the fact?

A. I will have to take time to think of that. Well, Mr. Don, as I understood it, was a workman there.

Q. Well, you say "as you understood." How do you get the understanding?

A. What do you mean?

Q. From what source do you get the understanding?

A. Well, that he was giving the orders there when Mr. Gillis was not there. In fact, all the time there, he—if he wanted a boat moved around to the other side, why, if Bob Don told me to do it, I did it.

Q. Now, that is all you know about the authority of relations of the parties there?

(Testimony of Arthur Robinson.)

A. No. My instructions, when I left Stockton was that I was to do what Mr. Gillis or—

Q. Or Mr. Don?

A. Yes, what they ordered.

Q. And that is all you know concerning the relations of the parties? A. That is all.

Q. Then, as a matter of fact, all you know you were there for was to take orders?

A. Yes, sir.

Q. And not to give orders? A. Yes, sir.

Q. And you had no control or no responsibility with regard to the method of raising the vessel?

A. No, sir.

Q. And the opinions that you have expressed here are simply the opinions of an employee who was talking about something concerning which he had no responsibility at all. A. Is that a question?

Q. Yes. Read the question.

(The last question was read by the Reporter.)

A. The opinions expressed were my own opinions.

Q. I understand that.

A. Without the employee business or anything else tacked on to it.

Q. But your suggestions here that Mr. Gillis did this or did that and did the other, and that it was against your judgment, are simply suggestions concerning matters that you had no concern with at that time? A. Well—

Mr. EELLS.—That is argumentative.

The COMMISSIONER.—It is self-evident.

(Testimony of Arthur Robinson.)

Mr. FRANK.—I am glad it is clear. That is the very point I wanted to bring out with reference to this witness.

Q. Now, the first time that you saw this vessel was when?

A. Well, the morning after the accident, when I was going home.

Q. Going home. How long did you remain there? Did you stop there at all?

A. I slowed up and hailed them and asked them if they wanted any help, or if I could do anything for them.

Q. That is all, and you went on?

A. I went on.

Q. You did not stop at all, you just slowed up and hailed them as you were slowing up?

A. I just slowed up and drifted; I did not go ahead; I had a barge.

Q. How far off were you?

A. A boat length.

Q. After that, when did you see her next?

A. It must have been a month afterwards—a month, about.

Q. About a month afterwards. What occurred in the meantime there you have no knowledge, of your own knowledge, at all?

A. No, no knowledge at all.

Q. You have said something about the hog chains being unbuckled? A. Yes.

(Testimony of Arthur Robinson.)

Q. When was it that you observed that. When did you first observe that, how long after the accident?

A. I cannot give the date, it was, I will say, when we began to raise the boat, when she began to come above the surface of the water.

Q. How long had you been working on her then?

A. I really should think you could get those dates from the books or something.

Q. We are getting now your own knowledge. We don't want anything about the books, you are testifying here. Now, you say you saw certain things. When did you see them? That is all we are after? A. In the fall of 1901.

Q. When? A. In the fall of 1901.

Q. About how long was that after you started to raise her, if you can fix it at all?

Mr. EELLS.—If you cannot fix the date, say so, Mr. Robinson. A. I cannot give the date.

Mr. FRANK.—Q. Can you give us any within a month of the time or make any approximation about it at all?

A. I think by looking at a memorandum book I could come somewhere within a month.

Q. Somewhere within a month of it?

A. Yes.

Q. What kind of a memorandum book?

A. A little vest pocket memorandum book.

Q. That you kept? A. Yes.

Q. Well, you cannot come without your memorandum within a month of the time. Is that right?

(Testimony of Arthur Robinson.)

A. Yes, sir.

Q. Then you did not see any of the crew unloosen these buckles, did you?

A. Why, certainly, I did.

Q. But it was done after she was raised above the top?

A. Why, certainly; I explained at the beginning of this, when you asked that question before, that we did that after they came above the water, the hog chains and hog posts.

Q. After they came above the water?

A. Yes, the tops of them.

Q. Now, who did it?

A. The crew, the men.

Q. The men did it? A. Yes.

Q. How many men did it?

A. Well, sometimes it would take one man and sometimes two or three men.

Q. Was Mr. Don around when that happened?

A. No, Mr. Don had left there.

Q. When did he leave?

A. Well, I would have to—that is dates again, which I cannot fix.

Q. How long did he leave before this thing happened?

A. He had most of the work done when he left—well, it was about a couple of weeks, if I can recollect—inside of a couple of weeks, as she began to come up, out of the water.

Q. Did he leave before she was raised?

(Testimony of Arthur Robinson.)

A. Yes, sir.

Q. He did leave before she was raised?

A. Yes.

Q. And it was after Mr. Don left that this thing happened? A. Yes, sir.

Q. Who else was present besides yourself when it happened?

A. Well, of course, the other diver—the other man that took charge there.

Q. Who was the other man that took charge there? A. Mr. Roach.

Q. Mr. Roach?

A. Yes; he took Mr. Don's place.

Q. Was he present? A. Yes, sir.

Q. Overseeing the job? A. Yes, sir.

Q. It was done under his direction?

A. I suppose so.

Q. What was Mr. Roach's full name, do you know?

A. They called him Jack; I don't know his full name.

Q. Do you know where he is now?

A. I don't know where he is now; he is somewhere in San Francisco; you can find out, I guess; I have not seen him since a long time.

Q. Now, you have testified to other suggestions that you made to Mr. Gillis during the time of the raising, for instance, concerning the washing of the mud out of the vessel? Who was in charge at that time, when you made those suggestions?

(Testimony of Arthur Robinson.)

A. Well, that was after she came up; that must have been Mr. Roach.

Q. Mr. Roach must have been—was in charge?

A. Yes, sir.

Q. You considered Mr. Roach a competent man, did you not, for that work? A. Yes, sir.

Q. These suggestions that you made were simply your ideas, but you did not approach Mr. Roach with them, did you? A. I did not *reproach* him.

Q. You did not suggest them to him—you did not approach him and suggest them to him?

A. Yes, I talked it over with him.

Q. He did not adopt your suggestions?

A. No, he did not; I just offered it for the good of the job, that is all.

Q. Now, how long did you say you were there, about three months? A. About three months.

Q. Now, during that time, Mr. Roach and Mr. Don were doing everything they could to keep the vessel up, were they not?

A. I should suppose so; as far as I know, they did.

Q. Acting in good faith and working as diligently as they knew how on it? A. Yes, sir.

Q. Both competent men, too, were they not?

A. I considered them such.

Mr. EELLS.—Who were both competent men?

Mr. FRANK.—Mr. Roach and Mr. Don.

The WITNESS.—Mr. Roach and Mr. Don.

(Testimony of Arthur Robinson.)

Redirect Examination.

Mr. EELLS.—Q. Did Roach give you any reason why he did not adopt your suggestions?

A. No, sir.

Mr. FRANK.—Q. What position do you occupy now?

Mr. EELLS.—He has told you all about it. He says he is working on the "Claremont."

Mr. FRANK.—Excuse me, he did not tell me all about it.

Q. What position do you occupy on the "Claremont"? A. First officer.

[Testimony of A. W. Brooks, for Petitioner.]

A. W. BROOKS, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What is your age, Captain? A. 78.

Q. What business are you engaged in at the present time? A. In the coal business.

Q. And you have got vessels?

A. I have got one little toy, the "Elaine."

Q. Prior to going into the coal business, what was your occupation and business?

A. Steamboating.

Q. For how many years?

A. About 35 years, on inland waters.

Q. And prior to that time, had you been engaged in seafaring business?

A. I was, before I went to the mines; I was running from 52 to 55, then I went to the mines.

(Testimony of A. W. Brooks.)

Q. Captain, for the last 20 years, have you built any steamers?

A. It is more than 20 years since we built, I think; I think we built a tug, the "Frolic," in the 70's.

Q. What other boat did you build?

A. Afterward we built the "Herald."

Q. What kind of a boat was she?

A. A stern wheeler; she is on the bay now.

Q. What year did you build her?

A. I can't remember—I don't remember what year; it was later on.

Q. Did you build any other boat? A. Yes.

Q. What boat did you build?

A. The "Leader."

Q. What kind of a boat is that?

A. A stern wheel boat.

Q. She is on the bay now? A. Yes.

Q. Do you remember what year she was built?

A. No, I do not.

Q. That is in the last 12 or 15 years?

A. No, later than that.

Q. What is that?

A. The "Leader" is later than that; I don't remember what year now we built her.

Q. Did you know Mr. Gillis in his lifetime?

A. Yes, sir.

Q. He was president of the Union Transportation Company? A. Yes, sir.

Q. State whether or not your relations with Mr. Gillis were friendly or otherwise?

(Testimony of A. W. Brooks.)

A. Very friendly.

Q. Did you have any conversation with Mr. Gillis as to what the "Dauntless" and "Weber" cost?

A. Well, we used to have a little talk once in a while.

Q. Did he state to you what the "Dauntless" cost?

A. He was bragging about having built two nice little boats that cost a good deal of money; I said "How much, Mr. Gillis?" He says, I think "$95,000 for the two boats.

Q. For the two boats? A. Yes, sir.

Q. You knew the "Dauntless" did you?

A. I know her; I have been aboard of her several times.

Q. Did you know when she was first built or had her Texas on?

A. The Texas—she had a small Texas for the officers right back of the pilot-house.

Q. Do you know whether that Texas was afterwards enlarged?

A. Yes, I think it was; I think it was continued right on the skylight.

Q. What would you say to be a reasonable cost of continuing the Texas in the manner in which it was continued, including furnishing her?

A. That is pretty hard to get at too. I don't remember how many rooms there was there, but—

Q. Leave out about the rooms; you know how long she was altogether. What would you say would be

(Testimony of A. W. Brooks.)

a reasonable cost of constructing that Texas, and continuing the construction of it, and furnishing it?

A. Well, I don't know anything about the furnishing or furniture, what was put on her, but I should think about $4,500 would do the job in good shape. That is a mere guess, you know, because I am not an expert on carpenter work.

Mr. FRANK.—Q. You are not an expert?

A. No, it is just a guess.

Mr. FRANK.—I object to that testimony and move that it be stricken out.

The COMMISSIONER.—He says it is a guess.

Mr. LEVINSKY.—I do not want a guess. When the captain uses the word "guess," I think he uses that—

Q. Did you say guess or opinion or estimate?

Mr. FRANK.—I do not care whether he used it as a guess or an opinion.

The WITNESS.—It is an opinion; of course, I could not swear it was right, I don't know.

Mr. EELLS.—He said he was not an expert on carpenter work.

Mr. LEVINSKY.—Q. That is your opinion and estimate, is it, then?

A. Yes, sir.

Q. Now, how long has the "Weber" been running? A. The "Weber"?

Q. The "Dauntless"?

A. Well, they were both running—

Q. Up to the time of the collision?

(Testimony of A. W. Brooks.)

A. I think about 9 or 10 years; I don't remember just exactly.

Q. What would you say was a reasonable and fair value of the "Dauntless" at the time of the collision?

A. Well, that is a pretty hard question, again. I don't think that they done any repairs to her for that time, except continuing that Texas on, and the boats run very steady for a great many years, and were very lucky, without any work being done; I don't think they missed a trip, but a boat depreciates.

Q. Read the question, Mr. Reporter.

(The last question was read by the Reporter.)

Q. Just before the collision?

A. Well, about $25,000 would be a fair valuation.

Q. Now, you say vessels deteriorate in value. How much do they deteriorate in value?

A. Well, I could not answer that question exactly, but we know that every once in a while they must be hauled out and a good deal of money spent on them, and put them in condition.

Q. Among steamboat men, how long is considered the life of a vessel?

A. Well, about 15 years.

Q. And what is meant by that, the life of a vessel?

A. Well, you have got to commence spending money on them to keep them up.

Q. Partly build them over again?

A. Well, rebuild them, and haul them out.

(Testimony of A. W. Brooks.)

Cross-examination.

Mr. FRANK.—Q. Captain, how long since you have left the steamboat business?

A. Well, it has been about 12 years now.

Q. Been out of it entirely about 12 years?

A. Yes—that is, not entirely; I keep a little boat up there.

Q. Yes, I understand; you have a little toy, as you call it, the "Elaine"? A. Yes, sir.

Q. But so far as steamboating is concerned, you have not been interested in it at all for 12 years?

A. No, sir, I have not.

Q. And previous to that time, in what capacity were you interested in them?

A. I was a pilot and master.

Q. Pilot and master? A. Yes, sir.

Q. Is that all?

A. Well, I worked from the bottom up, sir.

Q. I understand you worked from the bottom up; you mean that you went on board and worked your way up to pilot and master? A. Yes, sir.

Q. You said something here about building the "Herald" and the "Leader," and the "Frolic," a tug. In what way were you interested in the building of those vessels?

A. I was one-third owner.

Q. A third owner? A. Yes, sir.

Q. You did not construct them at all?

A. No, I did not construct them; I helped to pay for the construction.

(Testimony of A. W. Brooks.)

Q. That is all you had to do, you helped to pay for them?

A. I was there all the time on the job, that is, seeing that proper material went in a vessel.

Q. And that was a great many years ago, you don't remember just how long?

A. I don't remember the year, no sir.

Q. Do you think it was as long as 20 years ago?

A. Yes, sir.

Q. And since then you have not been interested in—

A. Yes, I had another boat built here; I had the present boat built here by Stone Brothers.

Q. The "Elaine." Now, that is the only way you have been interested in vessels, is it?

A. The only way.

Q. The only way you have been interested yourself in steamboats? A. Yes, sir.

Q. You have been master and pilot, you have been one third owner of the "Herald" and "Leader" in their construction, and in the "Elaine," and that is your entire experience? A. Yes, sir.

Q. You have not paid very much attention in the last ten years or fifteen years to the value of steamers, have you?

A. Well, no, only that I kind of take an interest to find out once in a while, but I never had any personal experience.

Q. You never had any personal experience and no personal interest—

(Testimony of A. W. Brooks.)

A. I have quite an interest, yes, because I was brought up to the business, and the business interests me, of course.

Q. I understand that. When I use the word "interest" I mean that you had a financial interest of some sort or a direct interest. You had no direct interest at all? A. No, sir.

Q. Just that general interest which we all have in things that we like? A. Yes, sir.

Q. You do not consider yourself an expert of values on steamboats at this time?

A. No, I am not an expert.

Q. When you say the "Dauntless" was worth $25,000, that is only a haphazard guess on your part. Is that right? Just a sort of haphazard guess at it?

A. It is a guess. If I wanted to buy a steamboat I would not give any more for her, if I had the business.

Q. You don't know what condition the "Dauntless" was in, either, do you?

A. I used to see her every second day.

Q. You say you saw her, saw her on the water?

A. Yes.

Q. But you never went on board to examine her?

A. No, not to examine her. I went on board but I never examined her; I had never any occasion to examine her.

Q. You don't know what her condition was at the time of the accident? A. No, sir.

Q. Do you? A. No, sir.

(Testimony of A. W. Brooks.)

Redirect Examination.

Mr. LEVINSKY.—Q. I understood you to say if you had the business for the "Dauntless" and wanted to buy her, you would not give more than $25,000?

A. No, I don't think I would.

Q. And that is based, you say, upon your having been interested in the building of boats and your knowledge as a captain and master, and of what other boats were selling for?

A. That is based on one thing that I remember: the "Leader," which was pretty near as big, cost us $24,000 to build and furnish, and there was not a great deal of difference in size.

Recross-examination.

Mr. FRANK.—Q. The "Leader" was a freight boat, was she not?

A. No, we had her on a passenger run for a long time.

Q. But she was built some 20 years or more ago, was she not? A. Yes, sir.

Q. You don't know anything about the difference in the cost of the materials or prices between that time and when the "Dauntless" was built?

A. No, sir.

Q. In fact, you don't know what the details of the "Dauntless'" construction was, you have already said that?

A. I used to visit her when she was on the stocks; she was a molded boat; both of them were molded.

Q. You mean both the "Dauntless" and the "Weber"? A. Yes, sir.

[Testimony of E. P. Rideout for Petitioner.]

E. P. RIDEOUT, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. You were the pilot on the "Mary Garrett" on the night of her collision with the "Dauntless"? A. Yes, sir.

Q. When the "Mary Garrett" had her bow into the "Dauntless," what were you doing with your boat?

A. I was working ahead on the engines to hold her there.

Q. Did you get any instructions to pull out?

A. Yes, sir.

Q. Who did you receive that from?

A. From the captain of the "Dauntless," who appealed to me to back out and come alongside and take the passengers off.

Q. At the time that you were holding her there, could the hole that was in the "Dauntless" have been closed?

A. Well, I could not say unless I had made an attempt to close it, whether it could have been closed or not.

Q. Did you see the hole after the vessel was raised? A. Yes, sir.

Q. And could you tell from having seen the hole afterwards whether it could have been closed, or not?

A. In my judgment, I think if an attempt had been made to close it, it could have been closed.

Q. Now, after you went alongside, did you break anything connected with the "Dauntless"?

(Testimony of E. P. Rideout.)

A. Well, I went alongside twice. After she was sunk, or before?

Q. On either occasion?

A. At the first occasion, I believe, when I went alongside to take the passengers off, she was—the guard of the "Garrett" pushed into the stanchion of the "Dauntless" on the side of the house.

Q. What stanchion do you mean?

A. I mean the side of the freight house.

Q. The stanchion on the side of the freight house?

A. Yes, sir.

Q. Did you break any lines?

A. I don't remember of breaking any lines.

Q. When you left the "Dauntless" could the "Dauntless" have been anchored?

A. When we left her finally?

Q. Yes.

A. I believe she could have been made fast, or something.

Q. Have been made fast?

A. If proper precautions had been taken.

Q. If she had been made fast, state whether or not she would have floated into deep water?

A. That is a question that depends whether the fastenings would hold; the strain on the boat might pull the fastenings out,—the strain on the line.

Q. But there were places where lines could have been fastened?

A. She was a long ways from the shore where lines should have been fastened, but the only way to

(Testimony of E. P. Rideout.)

fasten those lines would have been to drive piles in the time we had, or put the anchors to the shoals.

Q. You could have put anchors?

A. Anchors to the shoals, yes.

Cross-examination.

Mr. FRANK.—Q. But whether or not they would have held, that is a question you would not undertake to determine?

A. That is a question; you don't know how much strain there would be, what the current would have on the boat, on the lines or on those anchors; an anchor will only hold so much.

[Testimony of C. D. Clark, for Petitioner.]

C. D. CLARK, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. Your name is C. D. Clark?

A. Yes, sir.

Q. You are at present manager of the California Navigation and Improvement Company?

A. Yes, sir.

Q. What experience have you had in steamboating?

A. Well, my entire management experience has been with steamboats, 19 years now.

Q. Did you know the steamer "Dauntless"?

A. Yes, sir.

Q. How long had you known her?

A. From the year 1892 up to the time of the collision.

Q. What experience have you had, if any, in dealing with steamboats and valuing them?

(Testimony of C. D. Clark.)

A. Well, I have bought them and had to do with the construction of them.

Q. Do you consider yourself an expert in the buying and selling values of steamers, I mean of the class of the—

A. I think that I would be qualified to judge of the value of the stern wheeler steamer at this time, if that is what you mean to ask me.

Q. Yes. A. Yes, sir.

Q. Had you ever been aboard the "Dauntless"?

A. Yes, sir.

Q. On different occasions?

A. Not often; several times, however.

Q. Did you know her well enough to form an opinion of her value just prior to the collision with the "Mary Garrett"? A. Yes, sir.

Q. In your opinion, what was the reasonable value of the "Dauntless" just prior to the collision with the "Mary Garrett"?

A. I would say $20,000, or not to exceed $25,000.

Q. Is there any rate of depreciation on vessels after construction?

A. In discussions with men who have to do with things of that kind, it has been spoken of as ranging between 6 to 8 per cent.

Q. Per year? A. Per year.

Q. State whether or not that is a general allowance amongst steamboat men?

A. There is a diversity of opinion with reference to that. The average life, in my experience, with

(Testimony of C. D. Clark.)

stern wheel steamers, is 12 years. After that, it is a case of reconstruction.

Q. Within what limits do steamboat men calculate this deterioration?

A. I do not quite understand what you mean by that.

Q. Deterioration begins the first year, does it?

A. I think the deterioration is greater as the time goes on, that is to say, the first year her vitality is better than the second year, and as time goes on it would rapidly increase; the deterioration the first year might be trifling.

Q. State whether or not a second-hand vessel is ever worth as much as a new vessel?

A. Never; except that she be employed in a commercial trade which has particular advantages, for example, like the Alaska boom, or something of that kind.

Cross-examination.

Mr. FRANK.—Q. Mr. Clark, what did I understand you to say was your present position?

A. I am manager of the Navigation Company.

Q. Of this petitioner here? A. Yes, sir.

Q. And have been the manager for how long?

A. Approximately, going on 5 years now.

Q. Did you testify with regard to the value of the "Mary Garrett" in this case?

A. I think I did.

Q. What value did you put on the "Mary Garrett" when you testified? A. I don't recall.

Q. You don't recall? A. No.

(Testimony of C. D. Clark.)

Mr. FRANK.—Can you get the testimony, please, in the case, Mr. Manley?

The COMMISSIONER.—Yes. (Producing.)

Mr. FRANK.—Q. According to that, you were also in the employ of this company at the time of this accident, were you not?

A. Yes, sir. I have been with them about 15 years.

Q. About 15 years? A. Yes, sir.

Q. Now, what would you say was the value of the "Mary Garrett" at that time?

Mr. EELLS.—He has already told you he don't remember.

Mr. FRANK.—I am asking him what he would say now was the value of the "Mary Garrett" at that time?

Mr. EELLS.—He has answered your question. I submit you need not ask it twice.

Mr. FRANK.—I desire the witness' testimony now as to his opinion as to the value of the "Mary Garrett" at that t|me.

Mr. EELLS.—That is what you asked him.

The WITNESS.—At that time?

Mr. FRANK.—Q. What is your opinion of the value of the "Mary Garrett" at that time?

A. I should say between 15 and 20 thousand dollars.

Q. Really, Mr. Clark, you are the active man on behalf of the Improvement Company in the preparation of this defense, are you not?

(Testimony of C. D. Clark.)

A. I can't say that I have been, Mr. Frank; I have just got into it, three days ago.

Q. But you were in securing this present testimony, you are the active man on behalf of the company?

A. No, I have not had anything to do with that. Mr. Levinsky has gathered the testimony.

Q. Haven't you been in attendance here right along?

A. Yes, during the hearing here, rather as a listener, with the object of giving what advice I could. I couldn't go back on my cause.

Q. That is just the proposition that I am trying to get at, you are loyal to your cause, are you not?

A. Yes, sir.

Q. When did you first think of the values, in your own mind, of the "Dauntless"?

A. I can give you a detailed answer to that, if you wish, something to make it understood that I have given it quite some thought; prior to the time of this accident, there was a man who was seeking options on that property, together with the property of the Piper-Aden-Goodall Company, together with the property of the California Navigation Company, and the Sacramento Transportation Company, and he came to me and asked me about the values of all of the vessels; that is a fact.

Q. That is, for the purpose of creating a trust or consolidation?

A. That was what he had in mind; he proposed to buy them; this was a matter of two or three months before this happened.

(Testimony of C. D. Clark.)

Q. Did you make any examination of the "Dauntless" at that time?

A. I did not go aboard and give her a detailed examination, and never have.

Q. You never have? A. No.

Q. So those values you have given here are only based upon a sort of general conclusion as to her condition?

A. They are based upon her condition and relative matters; that is to say, in our business I have a certain standard from which I work in connection with the life of a vessel; it has been my experience that boilers peter out after 17 years.

Q. Then it is a kind of a general conclusion and not based upon any particular knowledge of the conditions of this particular vessel?

A. I never was in her hull, and therefore I couldn't say.

Q. Of course, it makes a difference how a vessel is kept up, what her value is, does it not?

A. As I understand it, this vessel had never had any work done.

Q. I don't care what you understood. You are basing it on the idea that she was not kept up?

A. To some extent.

Mr. EELLS.—What do you mean by "kept up"?

Mr. FRANK.—Kept up in good condition.

Q. That is it, is it not?

A. To some extent, yes.

[Testimony of James Burns, for Petitioner.]

JAMES BURNS, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. Your name is James Burns? A. Yes, sir.

Q. You are employed by the California Navigation and Improvement Company, are you?

A. Yes, sir.

Q. In what capacity? A. As port engineer.

Q. Did you know the steamer "Dauntless" prior to the collision with the "Mary Garrett"?

A. Yes, sir.

Q. Saw her on many occasions?

A. I saw her since she was built and started to run, almost continuously passing and repassing.

Q. You have been on her? A. Yes.

Q. On several occasions?

A. Yes—twice or three times, possibly more.

Q. Were you on her shortly prior to the time of the collision? A. No, sir.

Q. When were you on her?

A. Might have been about a year before the collision.

Q. About a year before the collision?

A. Yes.

Q. You have drawn plans and made estimates for the building of steamers? A. Yes, sir.

Q. You know of steamers having been sold?

A. Been sold?

Q. Yes.

A. Yes, I have heard of several steamers sold.

(Testimony of James Burns.)

Q. Will you state what, in your opinion, was the value of the "Dauntless" just prior to the collision?

A. Oh, I should judge along from—I don't know her exact condition, but I should judge from the time that she run, the time that she was running, it would be somewhere between 18 and 25 thousand dollars.

Q. When you say 18 to 25 thousand dollars, would you state whether the $25,000 was an outside figure?

A. Yes, sir.

Q. Did you see her after she was raised?

A. Yes, sir.

Q. Did you examine the holes or where the "Mary Garrett" struck her? A. Yes, sir.

Q. How far below the water line did that hole extend? A. I should judge about 18 inches.

Q. What was the width of the hole at the water line?

A. Possibly about 16 inches, or somewhere about that, as near as I can recollect; I didn't measure it, but glanced at it; it was between two floor timbers down at the point, and the extreme width there is 20 inches.

Q. So then it would be between 16 and 20 at the outside? A. Yes, it was not over that.

Q. I will ask you to state whether or not in your opinion that hole could have been closed or so fixed that the "Dauntless" would not have sunk?

A. Yes, it could have been closed very easily.

Q. How?

A. Well, by placing some soft material in there, such as old sacks, mattress, blankets, or anything of

(Testimony of James Burns.)

that shape, from the inside or from the outside either; it would be more easy from the outside, as the water would have held it up against it; from the inside it could have been thrown up against it with a timber.

Q. Now, did you know the Texas on the "Dauntless"? A. Yes, I have seen it.

Q. There was a Texas there which was recently built, a short one, was there not?

A. Yes, as I remember.

Q. And afterwards this Texas was continued, lengthened? A. Yes, sir.

Q. What would you say would be a reasonable and fair cost of constructing that Texas from the point where it started to the point where it was finished up?

A. I never examined that Texas and don't know the construction of it, but ordinarily that class of structure on a steamboat could be constructed for about, I should say, $3,000; somewhere along there.

Cross-examination.

Mr. FRANK.—Q. Mr. Burns, your business is port engineer for this Improvement Company? What does it consist of?

A. The entire mechanical department.

Q. That is, repairs? A. And building.

Q. As I understand you, you never examined the "Dauntless" with reference to her construction, and you don't know just how this Texas was built?

A. I was in other boats of a similar character. They are all pretty much alike.

(Testimony of James Burns.)

Q. You are assuming this was like some other Texas that you are familiar with? Is that right?

A. Yes, sir.

Q. But whether it was, or not, you don't know?

A. No, I can't tell you, other than the general appearance of it.

Q. Of course, you would not undertake to say that the price that was actually paid for building it was an improper price?

A. Well, I don't know what the price was?

Q. No. But whatever it was, you would not undertake to say that Mr. Gillis would have spent 3 or 4 times as much as it was worth in order to build her?

A. No, I should not think he would, because he was a very conservative man.

Q. Very conservative and very shrewd business man, was he not?

A. Yes, as I always understood, he was.

Q. So, if it cost a great deal more than you think that a Texas ordinarily would cost, you would naturally conclude it was very much better and very much different from the ordinary Texas, would you not, having those considerations?

A. Well, I would not think so, because it resembled in appearance the Texas on other steamers, and they are a cheap structure.

Q. I know, but you never made any examination, and you don't know? A. No, sir.

Q. Now, with reference to closing this hole in the side of the "Dauntless." You don't know what the

conditions were that prevailed at the time of the collision, you are only judging from what you think might have been done, if the conditions had all been favorable?

A. Well, conditions in closing holes are never favorable; it is always under adverse conditions, and steamboat men generally look to closing an opening like the very thing to keep the water out.

Q. Yes, I undestand; we all understand that. We all understand that a hole can be closed, but whether in any particular instance it was a practical thing to do depends entirely upon the particular circumstances attending it. Isn't that so? In one case, you may be able to close it, and in another you may not. Isn't that right?

A. If there is nothing else to interfere, and the hole ain't very large, it ought to be stopped up.

Q. Isn't what I have stated to you true; that under some circumstances it could be closed, and under others it could not, and it depends upon the individual circumstances at the time. You would not undertake to say that every hole could be closed up under all circumstances, would you?

A. If it was not too large.

Q. I should like you to answer the question.

A. If the hole was large, it could not be closed up; if it was small, it could be.

Q. There might be other circumstances attending it, might there not?

A. I don't know of any other.

(Testimony of James Burns.)

Q. You don't know of any other at all?

A. Nothing to prevent a small hole from being stopped up.

Q. Would you consider Mr. Strother's judgment with respect to it—he was the master of the "Mary Garrett" at the time and he was present and saw the circumstances—would be reliable upon that question?

A. It depends upon what he was engaged in at that time, whether he was engaged in saving passengers or looking after the closing of the hole.

Q. Whether who, Mr. Strother? A. Yes.

Q. In any event, he knew what the circumstances were better than you knew, did he not? He was there, and saw all the circumstances?

A. I could not tell what he knew at all.

Q. But you think he is a man of good judgment, don't you?

A. Yes, he is a man of fair judgment.

Q. Did you ever go on board of the "Dauntless"?

A. Before or after?

Q. Before the accident?

A. Before the accident, yes.

Q. I understand about a year before?

A. About a year, somewhere along there; I couldn't exactly tell, but it was somewhere in the neighborhood of a year.

Q. A year before the accident. What were you doing on board of her? A. Just visiting.

Q. What do you mean, visiting the master?

(Testimony of James Burns.)

A. Went aboard to look around and have a chat with the engineers.

Q. And that is all you know about the boat, just what you casually saw at that time when you went to have a chat with the engineers?

A. That is all.

Q. Do you have anything to do with the financial end of your company? A. In repairs, yes.

Q. Only in repairs?

A. And estimates of all kinds—estimates and work of all kinds.

(An adjournment was here taken until Wednesday, November 20th, 1907, at 10 A. M.)

Wednesday, November 20th, 1907.

[Testimony of B. F. Beringer, for Petitioner.]

B. F. BERINGER, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. Your name is B. F. Beringer? A. Yes, sir.

Q. What is your business?

A. Captain at the present time.

Q. What are you captain of?

A. The steamer "Constance."

Q. By whom is the "Constance" owned?

A. By the California Transportation Company.

Q. Have you a master's license?

A. Yes, sir.

Q. Do you know the steamer "Dauntless"?

A. Yes, sir.

Q. Were you on the "Dauntless" on the night of the collision with the "Mary Garrett"?

(Testimony of B. F. Beringer.)

A. Yes, sir.

Q. Were you there at the time the "Mary Garrett" left the "Dauntless"? A. Yes, sir.

Q. What position did you occupy that night on the "Dauntless"? A. Mate.

Q. State whether or not you cast any anchor?

A. No, sir.

Q. Do you know where the "Dauntless" was at the time the "Mary Garrett" left her that night?

A. Well, I know just about where she was.

Q. You were there? A. Yes, sir.

Q. I will ask you to state whether or not the "Dauntless" could have been fastened in any manner so that she would not have gone off into deep water?

A. Well, I could not say for sure if she could have been fastened.

Q. Sir?

A. I could not say for sure; no, sir.

Q. In your opinion, could she have been fastened?

A. Well, she could have had lines out, but whether they would hold or not, I could not say.

Q. Did you remain there with any of the crew when the "Mary Garrett" left the "Dauntless"?

A. Yes, sir.

Q. How long did you remain?

A. I remained from the time she was sunk until Sunday morning.

Q. Were you on another boat?

A. I went on the "Weber."

(Testimony of B. F. Beringer.)

Q. Were you on the "Weber" during these days, at any time or occasion when Mr. Gillis, the president of the Union Transportation Company, came down?

A. He was down there on the "Weber," at the time she came down.

Q. Did you suggest or have any conversation with Mr. Gillis about fastening or taking a line from the "Dauntless" and fasten it to keep her in position?

A. I mentioned about putting an anchor, that is, taking a line out in the river and anchoring her, but he did not think it was advisable.

Q. And she was not anchored or fastened at all?

A. No, sir.

Q. Did you have any conversation with Mr. Gillis after the collision between the "Dauntless" and the "Mary Garrett," regarding why he did not go to work on the "Dauntless"? A. No, sir.

Q. Did you have any conversation with Mr. Gillis after the collision in which he stated whose boat the "Dauntless" was, or anything of that character?

A. No, sir.

Q. What, if anything, was said by Mr. Gillis in any conversation he might have had with you in regard to the California Navigation and Improvement Company taking care of the "Dauntless"

A. At the time I mentioned about putting a line out, he told me he would take off everything he could, and the Navigation Company would take care of the

(Testimony of B. F. Beringer.)

boat; he would turn her over to them, or something to that effect.

Cross-examination.

Mr. FRANK.—Q. You say, Captain, you were the mate of the "Dauntless" at the time of the collision? A. Yes, sir.

Q. Do you know what the nature of the hole was that was in her side?

A. I know just about what it was.

Q. What was it?

A. It was a V-shaped hole, about three or four feet long, and about three or four feet wide, at the top.

Q. And how deep under the water?

A. Well, it was probably something like three feet.

Q. How wide at the water line?

A. At the top?

Q. At the water line.

Mr. LEVINSKY.—We submit this is not proper cross-examination, and the witness should be made their own witness if they want to ask him those questions.

A. Do you mean where the water went in?

Mr. FRANK.—Q. Yes.

A. Three feet, or probably four feet.

Q. Wide? A. Yes, sir.

Q. Immediately after the accident, did you go down there to examine the hole or with a view to stopping it up, or anything of that nature?

(Testimony of B. F. Beringer.)

A. The first place I went.

Q. That is the first place you went?

A. Yes, sir.

Mr. LEVINSKY.—That is subject to the same objection, that it is not cross-examination.

Mr. FRANK.—Q. When you got there, state whether or not you found it a practicable thing to stop up the hole?

A. When I got there, there was no possible show of closing it. As soon as I sized up the situation, I ran up and told the captain; I told the captain there was no show of saving her and the only thing to do was to beach her.

Q. How long was that after the collision?

A. I could not tell you just exactly when it was, but it was very shortly after the collision.

Q. I understand you to say it was the first thing you did?

A. I was in bed, and the first thing I knew I was thrown out of bed; I got out and dressed as quick as I could, and I rushed down to the lower deck; it was not but a very few minutes, but I could not say how long; it was done in a hurry.

Q. Subsequently she was backed down the river, was she?

A. Yes, sir. As soon as I notified the captain, he backed right down the beach.

Q. Now, when she was backed down on the beach, did you take any soundings? A. Yes, sir.

Q. Did you report them to the captain?

(Testimony of B. F. Beringer.)

A. Yes, sir.

Q. What was the situation?

A. Well, I had six feet forward and high and dry aft—backed her right up on the beach.

Q. How long did she remain that way?

A. He ordered me to shackle the anchor and get the anchor ready; I shackled the anchor and sounded again, and there was no bottom.

Q. There was no bottom? A. No, sir.

Q. What happened then?

A. Well, I reported to the captain, and he said he knew it, that the "Garrett" had pulled him off.

Q. What happened to your vessel?

A. Well, he ordered me to man the boats then.

Q. To man the boats?

A. Yes. I went up on the upper deck to get the boats ready, and the "Garrett" was at that time alongside.

Q. How long was it from the time you reported your first sounding to the time you found you were out in deep water?

A. It was not very long, not over four or five minutes.

Q. I understood you to say you were shackling your anchor on preparatory to anchoring her?

A. In case the captain ordered it, yes, sir.

Q. Then you abandoned that?

A. I had to, when he ordered me to man the boat.

Q. This anchor was on her main deck?

A. On the main deck, on the freight deck.

(Testimony of B. F. Beringer.)

Q. How long was it before that deck was submerged?

A. Well, it was very shortly after that.

Q. How deep did she settle down, then?

A. She settled down—well, there were about three rooms aft on the Texas out of water.

Q. And on the forward part, how was it?

A. It was down—standing right on her head.

Q. Standing right on her head?

A. Yes, sir.

Q. After she was sunk, or, during this time, what, if anything, was done with reference to saving the passengers, and taking care of them? A. Yes.

Q. What was done, I say?

A. After she was sunk we transferred the passengers on to the "Garrett."

Q. During the time between the time your first sounding was made and the time she began to sink, state what the conditions were on board with reference to the officers being occupied or otherwise in saving passengers or whatever they were doing?

A. Well, as soon as I got orders, I went and got all the boats ready, and filled most of them with passengers; then the captain ordered the passengers over on the other boat, on the "Garrett," and then I transferred them to the "Garrett."

Q. Was there any time to give any attention to anything else during that time? A. For what.

Q. For the officers to give attention to anything else except saving the passengers during all that time?

(Testimony of B. F. Beringer.)

A. The captain was in the pilot-house all the time; he was giving orders; of course, I didn't get all the orders.

Q. What I am trying to get at is, you were working, actively occupied, in taking care of the passengers and getting all ready to save life during that time? A. Yes, sir, certainly.

Q. And before you were done she was sinking and over— A. She was settled.

Q. She was settled and over on the beach?

A. Yes, sir.

Q. Now, I show you a photograph and ask you if you recognize that (handing)?

A. Yes, that is just about the shape she was in. I think I was in the boat at the time, the little skiff, the time that was taken.

Q. How long was this after the sinking—that this picture represents?

A. That was taken, I think it was, on Monday morning.

Q. When did the accident happen?

A. It happened on Saturday.

Mr. FRANK.—We offer this photograph in evidence and ask that it be marked Claimant Union Transportation Company's Exhibit No. 1.

(The photograph is marked Claimant Union Transportation Company's Exhibit No. 1.)

Q. Now, after the vessel had sunk and the passengers had been taken off, were any arrangements made about getting any other steamer to come there?

(Testimony of B. F. Beringer.)

A. Yes, sir.

Q. What was done?

A. Well, the captain, he went up on one of the boats, and he said he would bring down the "Weber" as soon as he could.

Q. Did he do it? A. Yes, sir.

Q. When did the "Weber" come down?

A. I am not positive, but it seems like it was Sunday night or Monday morning.

Q. What boat is this lying alongside of her?

A. That is the "Weber."

Q. Taken at that time?

A. Yes—of course, I ain't sure of that, it has been so long, I don't remember, but I stayed aboard of the wreck until the "Weber" came.

Q. Now, during the time that you were on board there—how long did you remain on board before you left her finally?

A. I stayed there until the "Weber" came down.

Q. And how long was that?

A. Well, I don't remember exactly, but it seemed like some time Sunday—Sunday night or Monday morning.

Q. Well, after that what, if anything, was done with reference to taking precautions to save the wreck?

A. Well, there was some of the things was taken off of the boat.

Q. You have spoken about the anchors. What was the weight of the anchors that the "Dauntless" had?

(Testimony of B. F. Beringer.)

A. Well, she had three anchors, one of them weighed about 300, and the other one 600, and the other one weighed something like 900 pounds.

Q. Those are very light anchors, are they not, to hold a boat in that position?

A. They are only to hold them small boats, those ordinary river boats; that is what the inspectors order.

Q. I mean, with the boat setting on the bottom, and with her nose floating, from sliding out?

Mr. LEVINSKY.—I object to that as immaterial and incompetent—

A. I don't see how you could hold her with them; I don't suppose twenty of them would hold a boat like she was unless something else was done.

Mr. FRANK.—Q. Now, I notice in this picture that the "Dauntless" is apparently lying a long ways from the shore. Is that right?

A. Yes, sir.

Q. How far was she off from the bank?

A. Well, I couldn't state exactly, but then she was quite a distance.

Q. Well, according to your best calculation, how far is that from the bank?

A. Well, the river there is something like half a mile wide, or a quarter of a mile wide, I don't know just exactly, and she was just in the middle of the river.

Q. In the middle of the river?

A. Pretty well in the middle of the river, yes.

(Testimony of B. F. Beringer.)

Q. Now then, this bank that she went on was not alongside of the shore, but was in the middle of the river?

A. Yes, pretty well in the middle of the river.

Q. Now, do you know what the nature of the bank is there? A. She was sandy—

Q. I don't mean the sandy bank or the bank under the water, but I mean the shore.

Q. It is tulles, a kind of swamp land; it is regular peat land.

Q. What, if anything, can you say with respect to the practicability of putting dead men into that peat land so as to hold that vessel?

A. My experience up river on the islands was that you could not put in dead men.

Q. They would not hold?

A. The only thing that would hold was an anchor.

Q. And the distance off, also, you say was about a quarter of mile, at least?

A. Yes, something like that. I couldn't tell you exactly.

Q. State whether or not, Captain, in your opinion, at that time, having in view the conditions and circumstances under which you found yourself, everything was done reasonably, within your power, to place the vessel in the best position possible?

A. Everything was done that we knew how, that could be done.

Q. Do you remember whether or not the "Mary Garrett," when she came alongside of the "Dauntless," mashed in the sides of the house?

(Testimony of B. F. Beringer.)

A. Yes; she crushed the upper deck there, the cabin deck.

Q. What was the position of the vessel at that time?

A. She was partly sunk then; she was landed right on the upper deck, you might say; she came right under the upper house. The hull was under water then.

Q. And crushed them?

A. Yes, sir, crushed them in.

Q. I understand you, you went on the "Weber"?

A. Yes, I left on the "Weber"; I don't remember just what time it was I was on her.

Q. Did the "Dauntless" change her position from the position represented here in this photograph?

A. Yes, sir.

Q. How long was it that she remained in the position in which you first saw her?

A. Well, every time the tide changed she would swing a little.

Q. How long was it before she slid off?

A. Probably two or three days after I went aboard the "Weber." Of course, I was not up nights, and I don't exactly know, only what I heard.

Q. You traveled up and down there?

A. Yes. I was in bed whenever we passed there; I had the day watch. But the time I was aboard of her was the time I noticed she moved.

Q. Did you see her at all after she had slid off?

(Testimony of B. F. Beringer.)

A. Probably the first night.

Q. You saw her the first night?

A. Yes. After we went down to the city—I went on the "Weber" and went down to the city, and when I came back, I was up that night, and I saw her that night.

Q. Had she slid off then? A. Not then.

Q. She had not slid off then? A. No, sir.

Q. After that, when was the next time you saw her?

A. I didn't see her until after they raised her.

Q. You didn't see her any more until after they raised her? A. Yes, sir.

Redirect Examination.

Mr. LEVINSKY.—Q. I show you a photograph marked Petitioner's Exhibit No. 1, and ask you to please look at it (handing).

A. (After examination.) Yes, that is about the way she was when the "Mary Garrett" left her.

Q. That is about the way she was the morning after the "Mary Garrett" left her?

A. Yes, sir.

Q. And after that time she went into deep water?

A. She kept working down.

Recross-examination.

Mr. FRANK.—Q. I understand you, this is the way she was, Claimant's Exhibit No. 1, the next morning? A. When I left her.

Q. When the "Weber" come alongside, which was on Sunday?

(Testimony of B. F. Beringer.)

A. That is about the same picture as that, only the "Weber" hides a part of the boat, you see; the "Weber" is tight alongside, you know, the high part of her.

Redirect Examination.

Mr. LEVINSKY.—Q. I understood you to say that the accident happened Friday night or Saturday?

A. It was on our trip going to Stockton; we was going to Stockton.

Q. Did the accident occur on Friday night or Saturday night?

A. Well, it was Saturday morning, at 2 o'clock.

Q. It was on Monday morning when you left?

A. Well, it was either Sunday night or Monday morning.

[Testimony of Nathan H. Frank, for Petitioner.]

NATHAN H. FRANK, called for the petitioner.

Mr. LEVINSKY.—Q. Mr. Frank, what books of the Union Transportation Company were delivered to you by the officials of the company prior to the fire?

A. Well, of course, I have not any knowledge of the general books of the Union Transportation Company, but the account books and the vouchers of the Union Transportation Company were given to me for the purpose of making proof of these damages, and everything that I thought that they contained material to the cost and expense of this vessel, and the cost and expense of raising her.

(Testimony of Nathan H. Frank.)

Q. Well, how many books did you have?

A. I could not tell you now. There were several books that they brought, and a large bunch of vouchers.

Q. Any book there showing a reasonable cost of the "Dauntless"?

A. I think so. They had all the accounts of the—

Q. Well, did you examine them and find the reasonable cost?

A. Yes. I went over the books with Mr. Magee with reference to preparing these damages. Of course I have no present knowledge of the details except that I know the books contained these matters that I was seeking for.

Q. Where was the office and principal place of business of the corporation at that time?

A. That I don't know; *it* assume it was in Stockton.

Q. And have you a statement of the expenses incurred in raising the "Dauntless"?

A. Not all of them; I have a partial statement. It is only a partial statement; it does not run up to the end, which was apparently in another book which was one I had and was lost.

Q. Will you produce that statement and have it on hand?

A. Yes. I offered Mr. Eells that statement the other day.

[Testimony of Mrs. Sarah A. Gillis, for Petitioner (Recalled).]

Mrs. SARAH A. GILLIS, recalled for petitioner.

Mr. LEVINSKY.—Q. Mrs. Gillis, do you know of any books of the Union Transportation Company being in the office of the company?

A. I do not.

Q. Where is the office of the company?

A. The office of the company now?

Q. Yes. A. I have charge of all the books.

Q. Where are those books?

A. Mr. Frank has those books, the books containing any matter pertaining to any expense of the company.

Q. Have you in your possession, at either Mr. Frank's office or otherwise, any books of the Union Transportation Company at this time?

A. Not any whatever.

Q. Where are they?

A. Mr. Frank has the books; I turned over all the books to Mr. Frank excepting the stock book and the account book.

Q. When were those turned over?

A. Last August.

Q. That is, since the fire? A. Yes, sir.

[Testimony of Nathan H. Frank, for Petitioner (Recalled).]

NATHAN H. FRANK, recalled for petitioner.

Mr. LEVINSKY.—Q. Have you examined those books, Mr. Frank, to see whether any statement of

(Testimony of Nathan H. Frank.)

the cost of the "Dauntless" is in the books that you have in your possession?

A. The cost of the "Dauntless"?

Q. Yes.

A. Yes. I have looked through them; I have the amount book of the corporation, and then I have a small account book that has this raising of the "Dauntless" in. That is all I have.

Q. I mean you have no book that shows the reasonable cost, what she was carried along at?

A. No. You mean a book writing her off from year to year?

Q. Yes.

A. Nothing at all. I have never seen anything of the kind.

[Testimony of W. G. Leale, for Petitioner.]

W. G. LEALE, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. What is your business, Captain? A. Steamboat captain.

Q. How long have you been engaged in steamboat business? A. 40 years.

Q. Are you the owner of any steamers?

A. Yes—we own the steamer "Caroline."

Q. Did you know the steamer "Dauntless"?

A. Yes, sir.

Q. You had been aboard of her?

A. Yes, occasionally.

Q. Did you know about how she was constructed?

A. Well, I don't know that I could enter into details, the way she was built; she was a well built ship.

(Testimony of W. G. Leale.)

Q. Do you know enough about the "Dauntless" to form an opinion as to what her value was just prior to the collision with the "Mary Garrett"?

Mr. FRANK.—Well, that is a question that the Court would have to determine. Going into the qualifications of the witness, he is not a judge of that.

The COMMISSIONER.—How does the Court find out?

Mr. FRANK.—By his experience, not his opinion as to whether or not he is qualified.

Mr. LEVINSKY.—Q. Answer the question.

The COMMISSIONER.—What is the point? The question is, does he know enough about the vessel to express an opinion about her value. If he does, we are entitled to have it.

Mr. FRANK.—Colloquially, that might be true, but for the purpose of qualifying as an expert, it is not true. Of course, I will take the ruling of the Commissioner, and will take an exception to the ruling.

The COMMISSIONER.—What are the questions previous to that?

Mr. LEVINSKY.—He has been on her and has been in the steamboat business for 40 years.

The COMMISSIONER.—I think he is as fully qualified for that as any of the other witnesses have been. Answer the question.

Mr. FRANK.—I will take an exception.

A. I have a general idea of what she was worth.

Mr. LEVINSKY.—Q. What, in your opinion, was a reasonable value of the steamer "Dauntless"

(Testimony of W. G. Leale.)

just prior to the collision with the "Mary Garrett"?

A. What was a reasonable value?

Q. Yes.

A. Well, I would put a reasonable value at about $25,000. She was about ten years old.

Mr. FRANK.—Q. What is that?

A. The boat was about ten years old.

Mr. LEVINSKY.—Q. The fact that she was ten years old, what effect does that have in arriving at a value?

A. Well, when a boat is ten years old she is pretty well worn, without she has been kept up right along.

Q. What would you calculate the depreciation to be on a boat running ten years, and reasonably kept up?

A. Well, that would differ in different boats; generally speaking, if she had not had any overhauling and was ten years old, she would depreciate, may be, fifty per cent., while others might not depreciate as much.

Q. What is there necessary to know in a boat in order to estimate her value?

A. What is it necessary to know?

Q. Yes.

A. You would want to know the condition of her boilers, her machinery—some boats seven years old, there might be some of their lumber rot, and another might be fifteen years old, and she would not be in as bad condition. It is a very difficult thing to determine without you make an examination.

(Testimony of W. G. Leale.)

Q. You know the general style of build and have been aboard of the "Dauntless"?

A. Yes, occasionally.

Q. Can you state whether or not the condition of vessels on the bay here are not a matter of general knowledge with those engaged in the steamboat business?

Mr. FRANK.—We object to that. It is an inference about what other people know.

The COMMISSIONER.—Read the question, Mr. Reporter.

(The Reporter reads the last question.)

The COMMISSIONER.—I don't see how he can know what other people may know. I do not think that would help me any in this investigation.

Mr. LEVINSKY.—We take an exception. That is all.

Cross-examination.

Mr. FRANK.—Q. Captain, of course, you do not know anything about what the condition of the boilers and of the wood of the "Dauntless" was at this time?

A. No, I would not know; I had never made any examination.

Q. In fact, you know nothing about her—

A. I know her generally.

Q. You know nothing about her at all except, as you say, as you saw her generally on the bay?

A. That is all.

Q. And you would not consider that as a fair basis upon which to base a judgment between the parties as to the value of the vessel?

(Testimony of W. G. Leale.)

A. I could not—I do not feel at liberty to do that, because I do not know enough about the vessel to do that, and what I give is just what I know on general principles.

Q. That is all?

A. That is all. I was not thoroughly familiar with the boat any more than I am with boats generally that I am not interested in.

Q. With the knowledge that you have, you would not undertake to buy her or deal with her in any way whatsoever, would you, or fix a price for her?

A. Not without looking closely into her. I have a boat now that is 30 years old, but there isn't any of the original boat left in her at all.

Q. 30 years old. According to the per cent. that you have estimated on, she would be worth less than nothing? A. She has been rebuilt twice.

Q. She would be worth less than nothing, would she not?

Mr. LEVINSKY.—He has already answered the question; he said she was rebuilt twice.

Mr. FRANK.—Q. She would be worth less than nothing, upon the percentage basis that you have estimated. Isn't that so?

A. On the percentage basis, yes.

Q. That shows that is no basis at all for calculating the particular condition of the vessel?

A. Well, a boat that hasn't had any overhauling, I think that is about the general estimate.

(Testimony of W. G. Leale.)

Redirect Examination.

Mr. LEVINSKY.—Q. I understood you to say you had been on the "Dauntless"?

A. I have been aboard of her, yes.

Q. You know her, generally?

A. Why, I have a general idea of things, as I have of most of the boats.

Q. And that is based upon seeing her in the bay and the purpose for which she was being used?

A. Yes, sir.

Q. And upon that you base your value?

A. Yes, sir.

Q. Now, from that you can determine what the maximum value of a boat would be and what these conditions and length of time she would be running would make her approximately worth?

Mr. FRANK.—I object to the form of the question. He is practically testifying himself. I think the witness can tell what the basis of his knowledge is. He has already told us—

Mr. LEVINSKY.—Q. Upon what do you base your value?

A. Just a general idea of what I knew of the boat, compared with other boats of that same class.

Q. Notwithstanding you did not make any critical examination of the boat, state whether or not you could state within certain limits as to her value, and whether or not it is upon that that you base your opinion?

Mr. FRANK.—That is incompetent. He does not know anything about that.

(Testimony of John Grant.)

The COMMISSIONER.—He has already stated what he thought the value was and the grounds on which he based it.

Mr. LEVINSKY.—He has said he had been aboard of her.

The COMMISSIONER.—I think he has gone all over that. If he has not, of course—

Mr. LEVINSKY.—That is all.

[Testimony of John Grant, for Petitioner.]

JOHN GRANT, called for the petitioner, sworn.

Mr. LEVINSKY.—Q. Your name is John Grant? A. Yes, sir.

Q. What is your business, Mr. Grant?

A. Shipwright.

Q. How long have you been engaged in that business? A. About 32 years.

Q. Did you know the steamer "Dauntless"?

A. Yes, sir.

Q. Did you know her from the time she was built?

A. Yes, sir.

Q. Did you ever have any conversation with Mr. Gillis as to what the "Dauntless" cost?

A. No, sir.

Q. Were you informed by anyone as to what she originally cost?

A. Well, I have heard some one say what she cost, but Mr. Gillis never told me what she cost; I never had any conversation with him as regards the cost of the boat. Now, just a minute; before I go any further with this question, I gave you a statement

(Testimony of John Grant.)

years ago, Mr. Frank, and it is a hard proposition—I do not want to mix myself up. Now, you have got the statement; a man would have to have a good memory to remember what he said five or six years ago.

Mr. FRANK.—No doubt, Mr. Grant, whatever you say, you will tell the truth in this matter, and that is all we are looking for.

Mr. LEVINSKY.—I wish to have it noted that these remarks are addressed to Mr. Frank, the attorney for the Union Transportation Company.

Q. I will ask you to state whether or not you did the work from time to time on the "Dauntless"?

A. Among the repairs that was done on her, I generally done the carpenter work.

Q. State whether or not from the time the "Dauntless" was built until the time of the collision she was overhauled?

A. Well, I don't know that she had ever any big overhauling; she always had the necessary repairs.

Q. Just what was considered necessary repairs?

A. Yes, sir.

Q. But not what was considered an overhauling?

A. I don't think the boat was ever hauled out; she might have been hauled out in San Francisco and overhauled, but I don't know anything about the overhauling that was done there.

Q. Did you examine the "Dauntless" after she was raised and brought to Stockton?

A. Yes, sir.

Q. At whose request?

(Testimony of John Grant.)

A. Well, I don't know that it was at anyone's request; she was brought to the yard, and I couldn't help but examine her.

Q. State whether or not Mr. Gillis requested you to examine her with a view of estimating the cost of repairing her?

A. Well, he asked me what I thought it would cost to repair her.

Q. Did you examine her?

A. Yes, I made an estimate on her.

Q. Did you give Mr. Gillis a figure on that?

A. Yes, sir.

Q. What was that figure?

A. I cannot tell you; Mr. Frank has got that figure, I don't know what it is now.

Mr. LEVINSKY.—Mr. Frank, have you that figure?

Mr. FRANK.—I have not got them here.

The WITNESS.—I don't remember what they were.

Mr. LEVINSKY.—Have you the figures in your possession?

Mr. FRANK.—Well, it is immaterial if I have, or not. This witness is testifying now of his own knowledge concerning those matters, and what figures he might have given me or might not have given me, I do not know as it cuts any figure at this time. Whatever he knows, is the testimony—

Mr. LEVINSKY.—I now demand that you produce the figures that Mr. Grant gave to you as to

(Testimony of John Grant.)

what he offered to repair the steamer "Dauntless" for after she was raised.

Mr. FRANK.—You need not go into that formality. If I have the figures or anything which may be material evidence you are perfectly welcome to them. We have got nothing to hide them for. I have not them here now.

Mr. LEVINSKY.—Will you have them here after lunch?

Mr. FRANK.—If I have them. Go on and examine your witness.

Mr. LEVINSKY.—I respectfully suggest, Mr. Commissioner, that I have a right to examine the witness in my own way.

Mr. FRANK.—You have a perfect right to examine the witness in your own way, but you have not a right to make a demand of me at all.

Mr. LEVINSKY.—I have that right.

Mr. FRANK.—Whatever I have in the matter you are perfectly welcome to, but you have no right to demand it from me as a matter of right.

Mr. LEVINSKY.—I demand it, and I will ask to have it produced this afternoon.

Mr. FRANK.—If I have it, I will produce it.

Mr. LEVINSKY.—Q. Do you remember that the figures were that you stated that you would repair the "Dauntless" for after the collision?

A. No, no idea at all.

Q. I will ask you if the figures, as near as you can remember, were $8,000, approximately?

Mr. FRANK.—He says he has no idea at all.

(Testimony of John Grant.)

A. I ain't sure about the figures; I can't remember that far back about the "Dauntless," the shape she was in; in the shape she was in I don't know what it would cost. The figures was just a rough estimate on it.

Mr. LEVINSKY.—Q. After an examination of her? A. Yes, sir.

Q. Now, when you examined her after the collision, after she was raised, did you examine her hull?

A. Yes, sir.

Q. Could you tell to what extent the hull was injured by the collision? A. Why certainly.

Q. Was it slight or great?

A. Well, it was quite a lot of damage done; she had a hole in her about six feet at the guards, and deeper down to the width of the "Garrett's" stem, down at her knuckle.

Q. Was that damage to her hull, I am asking you, caused by the collision—

A. I am telling you about the size of the damage now.

Q. Did you examine her upper works?

A. Yes; her upper works was badly damaged.

Q. Now, how was that damage caused, would you say?

A. From wrecking the steamer, getting her afloat.

Q. Any part of her upper decks cut off?

A. Parts of it, yes; they cut it off to get the timber across her.

Q. How about the hog chains?

(Testimony of John Grant.)

A. Well, there was some of the hog chains carried away.

Q. Would you say that any injury was occasioned to her upper works by dropping the hog chains?

A. It injured her some, why certainly.

Mr. FRANK.—Now, I want to offer an objection here. Of course, Mr. Grant, anything that you know of your own knowledge, which you have seen, that is competent testimony—

Mr. LEVINSKY.—We shall object to counsel—

Mr. FRANK.—I am offering my objection—but any inference that the witness has drawn from things that he did not see is a different proposition entirely, and that applies to this question about removing her hog chains and that causing the injury or damage, unless he saw them and saw the conditions under which it was done, and matters of a similar nature. I object to them as being mere inferences and not based upon any knowledge of the witness.

Mr. LEVINSKY.—I object to the attorney instructing the witness how he must answer the question.

Mr. FRANK.—Please put a question, and we will see if it is competent, or not.

Mr. LEVINSKY.—Q. What would you say that the character of the injury caused by the collision was as to whether it would have caused little or much trouble to have repaired her if she had been taken care of at an earlier date?

A. Well, if she had not had any collision, she would not have needed any repairs at all.

(Testimony of John Grant.)

Q. I do not mean that. I mean, if the "Dauntless"—if steps had been taken to raise the "Dauntless" in a short time after she met with the collision, whether it would have cost much to have repaired her?

A. Well, that is a hard one; I don't know; it all depends, if the boat went in deep water, it would cause as much damage a week after—it would cause the same damage as within a day.

Q. Is a vessel benefited by being in water four or five months?

A. No, sir; but it would take the same amount of labor to raise her in 20 feet of water to-day as it would five months from now; it would not give any more labor, only in this way, that she would be full of sand.

Q. What effect would that have upon her?

A. Heavier to lift.

Q. What effect would that have upon her upper works? A. I don't know.

Q. Did you examine this hole?

A. Yes, sir, I went and examined it.

Q. Could that steamer have been kept afloat in any manner, notwithstanding that hole?

A. It could if they run her ashore, I guess.

Q. Any other way for that hole to have been close?

A. Well, yes, it might have been closed.

Q. How?

A. By putting a tarpaulin or something in front of it.

(Testimony of John Grant.)

Q. How about a mattress?

A. Well, a mattress or tarpaulin do the same thing; either you could have.

Q. Could a man put his back against the hole?

A. He might have done that, too.

Q. Did you call Mr. Gillis' attention to those things? A. No; I don't know that I did.

Q. If you did, did he express any surprise that such acts were not done?

A. Well, I don't know whether he did, or not.

Q. What would be the reasonable time required in raising a boat situated as the "Dauntless" was some time after the collision?

A. That is another one; some people might raise her in a month, and others might come and it would take them six months. I have no idea what it would take to raise her.

Q. What do you think about the possibility of holding her in place with anchors and lines?

A. You could easily hold her in place, if you made her fast.

Q. Could that have been done?

A. Well, I wasn't down there to see the exact place where she was at the time; I think it could have been done by throwing her anchor overboard to hold one end of her.

Q. You knew the "Dauntless." Been on her a great many times? A. Yes.

Q. And repaired her and knew all about her?

A. Yes.

Q. What would you say would be a reasonable value of the "Dauntless" just prior to her collision?

(Testimony of John Grant.)

A. $25,000 or $30,000.

Q. Would you say $30,000 would be the outside figure? A. Well, somewhere around there.

Q. And what would you figure for depreciation in a boat that had been running for nine years and a half and never been overhauled?

A. It depends on the condition they kept the boat in.

Q. In the manner in which the "Dauntless" was kept?

A. Well, if she was about ten years old, about half, about 50 per cent; her life yould be about 20 years; she was ten years old; it would be about half of it.

Q. Now, this is the first time I have seen you. You had a talk with Mr. Frank Nicols in Stockton on the 14th of this month, did you not?

A. Yes, sir.

Q. Did you in that conversation state that you were informed by Mr. Gillis that the original cost of the "Dauntless" was $45,000?

Mr. FRANK.—I object to that. He is your own witness. I do not think you can either lead him or impeach him. He has already stated that he had no recollection about it, and you are trying to impeach him. It is certainly incompetent.

The COMMISSIONER.—What was his original statement as to that. Did he make any statement as to his knowledge of the original cost?

Mr. LEVINSKY.—I will just state this, that I have here a letter sent to me by Mr. Nicols, and he

(Testimony of John Grant.)

states that on the 14th of this month that he and Mr. Grant had a conversation. It is only because he fails to recollect; that is the reason I want to ask him if he did not make a statement to Mr. Nicols on the 14th of this month, for the purpose of refreshing his memory.

The COMMISSIONER.—As to the original cost of the vessel?

Mr. LEVINSKY.—Yes.

The COMMISSIONER.—Has he said anything as to the original cost of her?

Mr. LEVINSKY.—I asked him if he was told by Mr. Gillis as to the reasonable cost and he said Mr. Gillis never informed him.

The WITNESS.—I never had that conversation with Mr. Gillis, but I have heard that the boats cost $45,000 or $50,000; that is as near as I can get to that; I don't know as I had that conversation with Mr. Gillis. I might have said to Mr. Gillis that I had heard that is what the boats cost, $45,000 to $50,000.

Mr. LEVINSKY.—Q. In conversation with Mr. Nicols in Stockton, on the 14th of this month, did you state that after you examined her you found that her hull had been but slightly injured by the collision, but that the great damage to her had been evidently caused by those engaged in raising her, cutting off her upper works and breaking her by dropping the hog chains?

Mr. FRANK.—We object to that.

The COMMISSIONER.—If he has made any statement at any other time contrary to the statement he has made now, I suppose it is competent.

(Testimony of John Grant.)

Mr. FRANK.—He is their own witness. They cannot impeach their own witness.

Mr. LEVINSKY.—Read the question, Mr. Reporter.

(The Reporter reads the last question.)

A. I believe I did.

Q. And that was true and correct, was it not?

A. They could not have done that without doing that.

Q. Did you in that same conversation state that the injury caused by the collision was such in character as would have taken little cost or trouble to have repaired?

Mr. FRANK.—The same objection. I suppose there will be the same ruling; I will take an exception.

A. If they could have got her on the ways it would not have cost much to repair her.

Mr. LEVINSKY.—Q. And that when you told Mr. Gillis that you told Mr. Gillis the boat could have been easily kept afloat by putting a mattress in the opening or by a man putting his back against the hole, if the boat had been run upon the bank and tied up, and that Mr. Gillis expressed surprise that such acts had not been done?

A. Well, I might have said that, too, yes.

Q. Then, do I understand you to say that the hull was but slightly injured by the collision, but that the great damage was evidently caused by those engaged in raising her, cutting off her upper works, and breaking her by dropping the hog chains?

(Testimony of John Grant.)

A. Yes, sir.

Q. Now, with proper appliances, and before the "Dauntless" had been filled with mud, could she have been raised easier than after letting her float around in deep water and fill with sand and mud?

A. Well, I ain't much in the wrecking business, sir, but I suppose it would be easier to raise her in a week after she was sunk than three months after, because she would fill with dirt and stuff like that.

Q. What effect would the remaining of her in the water for this long length of time have as to increasing her weight?

A. I don't know; it all depends on how much went into her.

Q. I mean, would it have any effect by the vessel becoming soaked with water?

A. Well, I suppose it would some, yes.

Mr. FRANK.—Q. What is that?

A. There would be some effect.

Mr. LEVINSKY.—Q. What would you figure the difference in time required to raise the "Dauntless" if steps had been taken at once compared with the time after waiting some two or three months?

A. I don't know how deep she was when she sunk; I don't know how deep in the water she was; I never saw her when she was sunk; it all depends on the depth of the water the boat was in; I don't know.

Mr. LEVINSKY.—I withdraw that last question.

Q. I show you a photograph marked "Petitioner's Exhibit No. 1," supposed to represent the

(Testimony of John Grant.)

condition of the "Dauntless" the morning after the collision. Assuming that at that time there was about ten feet of water at her stern and about 25 feet or 26 feet of water forward, and that after that time she floated into water that was 50 feet deep, what would be the difference in time?

A. I don't know the difference in time, but it would have been easier to raise her now than 50 feet of water; the time I don't know.

Q. Easier to have raised her in the position in this picture?

A. It would be easier to raise her in that position than in 50 feet of water. (Referring to Petitioner's Exhibit No. 1.)

Q. Now, in speaking of her hole. Can you state how far below the water line this cut extended?

A. Right down to her knuckle, right down to the lower edge of it.

Q. About what was the length of that below the water line? A. Up and down?

Q. Yes.

A. The whole depth of the boat, about 6 or 7 feet.

The COMMISSIONER.—Q. From the water line to the knuckle is 6 or 7 feet?

A. From the guard. It was cut from the guard down.

Q. He asked from the water line to the knuckle.

A. From the water line to the knuckle.

Q. Yes.

(Testimony of John Grant.)

A. I don't know how much water she was drawing at the time; the water line would have been the load line; I don't know how deep she was in the water; I don't know what water the boat was drawing; I don't know whether she was loaded, or not.

Q. You say from the guard to the knuckle is six or seven feet? A. Yes.

Mr. LEVINSKY.—Q. What did Mr. Gillis say to you when you told him what you would repair the "Dauntless" for after the collision?

A. What did he say?

Q. Yes.

A. I don't know; I could not tell, it is too long ago.

Q. Did he employ you?

A. No, sir. I didn't do any work to it at all.

Q. You mean after the collision?

A. Not that I know of, not at that time.

Cross-examination.

Mr. FRANK.—Q. Mr. Grant, you are not a wrecker, are you? A. No, sir.

Q. You don't know anything about it?

A. No, sir.

Q. You are not a navigator either, are you?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Q. So with reference to what might have been done to save her or stopping her up or all of that matter, you are just giving the ordinary every-day

(Testimony of John Grant.)

idea about it without any idea of being an expert upon the subject at all. Is that right?

A. I ain't an expert.

Q. Just the same as I or anybody else that say, well, I suppose the hole could have been stopped up if the conditions had been all right so we could get at it? A. Yes, that is about it.

Q. You don't know what the conditions were at all? A. The conditions of the wreck?

Q. Yes, at the time of the accident.

A. No, sir. I was not there at all. I never saw the boat at all while she was sunk.

Q. Now, when you say that her hull was slightly damaged, or in respect to the question of counsel here of having told Mr. Nicols that she was slightly damaged, you mean you were referring to the hole in her side, were you? A. Yes, that is all.

Q. That is all? A. Yes, sir.

Q. You described the amount and nature of that, didn't you? A. Yes, sir.

Q. Being about how deep?

A. Well, it was the whole depth of the side, and about six feet above; the planks were sprung may be twelve feet long, and it tapered down to about a foot at the knuckle.

Q. When you speak of slight, you do not mean that that was only a slight damage. That was a pretty considerable damage was it not?

A. Well, it ain't a big damage. A repairer, if he could have got aboard, could have done it.

Q. Yes, if she had not sunk and they could have kept her afloat until it was repaired, that particular

(Testimony of John Grant.)

repair, as compared with the amount that became necessary afterwards, would not have become so much? A. Yes, sir.

Q. But having sunk and having to be wrecked was a different proposition, was it not?

A. Yes, sir.

Q. With reference to the dropping of the hog chains. You were not there when that was done?

A. No, sir.

Q. You don't know where her situation was or how she was supported, or—

A. I don't know how they carried away, but I know she was hogged when it was brought to me—they were carried away.

Q. What effect *that that* had on it you don't know because you don't know what the situation of the vessel was?

A. Well, the effect of letting her chains go would straighten her out; that is all. Of course, I seen the effect when they brought her out.

Q. You saw that hogging? A. Yes, sir.

Q. You don't know whether it was the result of letting go the hog chains or the result of something else? She might have been hogged before they did that, might she not? A. Yes, sir.

Q. In fact, lying on an uneven bottom—

A. Would carry them away.

Q. Would carry them away and hog her?

A. Yes, sir.

Q. You did not see any considerable amount of dirt in her, did you, when you saw her?

(Testimony of John Grant.)

A. Well, there was some dirt in her, I don't remember just how much. I remember some mud got in there.

Q. But not enough to make any considerable difference, was there?

A. Well, I couldn't tell that. I forget how much was in her.

Q. In your opinion, the damage that was done to her in raising her was absolutely necessary. She could not have been raised without it?

A. I don't think she could, no, sir.

Q. Have you ever considered what the value of her was in her then condition before, or is that just a haphazard estimate?

A. It is a rough estimate on her.

Q. Made on the spur of the moment?

A. I think this way; the boat cost $50,000—which I heard she cost; I don't know how much she did cost—and if she is ten years old, I think that 50 per cent of her would be about—

Q. About $25,000? A. Yes.

Q. That is the only basis that you have for making that figure, isn't it?

A. That is all. I know she was eight or nine years old; that is the reason I said $25,000.

Q. That does not take into consideration her furnishings or fittings at all?

A. No, sir. I just figure on the boat; I don't know anything about the furnishings; I never had anything to do with the furnishings.

(Testimony of John Grant.)

Q. If, as a matter of fact, she cost all the way from 65, 66 to 75 thousand dollars, furnished as she was at the time of her loss, your valuation would be a great deal more, wouldn't it?

A. Certainly.

Q. You are not basing your valuation upon any knowledge of her condition at the time but simply upon a general proposition that if she cost $50,000 and she was ten years old, she ought only to be worth half that? A. Yes, sir.

Q. That is all there is to it?

A. Yes, that is all.

Q. Was she not always kept up, Mr. Grant, in first-class condition?

A. Always all the necessary repairs was done on her.

Q. By necessary repairs, do you mean that she was kept up in perfect condition or that she was simply kept going?

A. Well, any damage that was done, sir, was always repaired; I never done any extra work on her; I never took away the planking, but I always did what was necessary.

Q. Do you remember the new boilers that were put into her?

A. No, sir; that was done down in San Francisco.

Q. There might have been repairs done in San Francisco that you did not know anything about?

A. Oh yes.

Q. All you are talking about is what you happened to do up in Stockton?

(Testimony of John Grant.)

A. Yes, sir, that is all, in Stockton. I didn't even know that she had new boilers in, it is so long ago.

Q. Then, as a matter of fact, you really didn't know in what condition she was kept. All you know about is particular repairs you happened to make on her?

A. I knew how she was kept up, and that she was kept in pretty good shape; any time that she needed repairs that was necessary in Stockton, I done it; any big repairs or new boilers, all that was done in San Francisco; I thought she was kept in very fair shape.

Q. I understand that you were a ship carpenter?

A. Yes, sir.

Q. Doing joiner work particularly?

A. No, ship carpenter work; I don't do any joiner work.

Q. Don't do joiner work at all? A. No, sir.

Q. By joiner work, I mean such work as on the upper house. A. I know.

Q. You did nothing at all except to the hull?

A. To the hull.

Q. That is all?

A. That is all. I had joiners do work in the yard, but that is not my business at all; I am a ship builder.

Q. Now, do you remember whether or not her planking and her frames were in sound condition?

A. Well, her frame was sound, because it was a cedar frame; I know that was sound; her planking I don't know about; it takes a long time to rot the cedar.

(Testimony of John Grant.)

Q. You don't know what the condition of the planking was at all?

A. No, sir, I don't; I don't remember, and can't tell.

Q. And outside of her planking and her frames, you would not have any knowledge of the other things?

A. I would not make any estimate of any joiner work.

Q. Nor her machinery or anything of that kind?

A. No, sir.

Q. Which would you consider the more valuable vessel, the "Dauntless" or the "Mary Garrett"?

Mr. LEVINSKY.—We submit that is not cross-examination.

A. The "Dauntless."

Mr. FRANK.—Q. Was she a very much more valuable vessel than the "Mary Garrett"?

A. I know one was an older ship than the other, and I thought the new one was the most valuable of the two ships.

Q. When you speak about a vessel's woodwork being soaked under water—a vessel that is painted, as this vessel was, would there be very much soaking and if so, what effect would the soaking have, so far as the damage to the vessel is concerned?

A. Well, it would only make a little extra weight, and I don't think that would amount to a great deal. I have no idea how much difference it would make.

Q. If she is a well painted vessel, she would not—

(Testimony of John Grant.)

A. Painted on the outside, but not painted inside.

Q. How do you mean, not inside?

A. Inside of the hull ain't painted.

Q. Inside of the hull?

A. Yes; and suppose she was filled with water.

Q. Well, that would not be a material matter, would it? Just answer yes or no? A. No, sir.

Q. It takes a great many appliances, does it not, in order to raise a vessel even in the condition in which she was shown in Petitioner's Exhibit No. 1?

A. Yes, sir.

Q. And it takes time to get the appliances, does it not?

A. Yes—those wrecking companies, I guess, have got all the appliances.

Q. They don't have them up there on the San Joaquin River?

A. No, sir, there is nothing up there.

Redirect Examination.

Mr. LEVINSKY.—Q. Mr. Grant, I forgot to ask you a question: you knew the old Texas or what Texas deck was on the "Dauntless" when she was first constructed, did you? A. Yes, sir.

Q. And did you know the continuation that was made in the Texas deck?

A. I know the house was put on.

Q. You know what kind of a house it was?

A. I have seen it. I never examined it. I have just said my business was shipwright. Now this is joiner work, and I don't know anything about that.

(Testimony of John Grant.)

Q. I understood you to say—

A. But I could make a rough estimate on things.

Q. What would you say the reasonable value of extending that Texas from the way in which she was originally constructed to the way she was finally constructed would cost?

Mr. FRANK.—I object to that. This is not a guessing party. It is not based upon any expert knowledge upon the subject, not being within the line of his business; we can all guess as well as he can, and I do not think the Court would give very much weight to it. I object to that also on the ground that there is no foundation laid.

The COMMISSIONER.—I think the witness is a little modest. It seems to me he ought to know about that.

Q. Do you keep a shipyard up there?

A. Yes, sir.

Q. You have got a shipyard up there?

A. Yes, sir.

Q. Did you do all the repair work to the "Dauntless" that was done to her in Stockton?

A. She was not overhauled.

Q. Did you do all the repair work from the time she was built up to the time she was wrecked?

A. No, sir, I did not.

Q. I thought you said you did?

A. I done all the work done in Stockton, the ship carpenter work up there.

Q. That is what I mean, all the ship carpenter work?

(Testimony of John Grant.)

A. He is talking about the joiner work.

Q. Was she ever hauled out? A. No, sir.

Q. All the work you ever did was in the water?

A. Yes, sir.

Q. You don't know whether she ever was hauled out? A. I don't know.

Mr. LEVINSKY.—Q. What would you say would be a reasonable cost for continuing that Texas?

Mr. FRANK.—I insist upon the objection.

The COMMISSIONER.—If he says he does not know anything about it, he is not competent to testify. But I think he is too modest about it; a shipwright, although it is a totally different work from the joiner work—they don't want to do joiner work and do not think anything about it, and yet—

Mr. LEVINSKY.—Q. Do you take contracts for that class of work?

A. I have never contracted any house work on a steamer; the business I am in is dredge building, mostly.

The COMMISSIONER.—If you don't know, say so.

The WITNESS.—The cabins put on there don't compare with the cabins at all that is on these steamers; of course, I contract for that work.

Mr. FRANK.—Q. You contract for cabins on dredgers? A. Yes, sir.

Mr. LEVINSKY.—I object to the interruption of counsel.

(Testimony of John Grant.)

Mr. FRANK.—I have a right to examine the witness.

Mr. LEVINSKY.—Not when I am.

The COMMISSIONER.—Do not get excited. He simply wants to find out as to his qualifications.

Mr. FRANK.—Q. Those cabins on the dredgers are mere rough houses, are they not, and just to cover the machinery?

A. That is all, and a place to live in.

Mr. LEVINSKY.—Q. You know what paint costs, don't you? A. Yes.

The COMMISSIONER.—Get right down to it, and ask him if he knows, if he don't, let him say so.

Mr. LEVINSKY.—Q. State whether or not you know? A. What paint costs?

Q. No, what it would reasonably cost to continue the Texas on the "Dauntless" from where she was originally constructed to where she was finally constructed?

Mr. FRANK.—I make the objection that that is not material. The question is what it did cost—

The COMMISSIONER.—He is asking him if he knows.

Mr. FRANK.—Let him say "yes" or "no."

The COMMISSIONER.—Q. Do you know, or do you not know? Do you know what it would reasonably cost to put that Texas on?

A. Do I know positively what it would cost?

Q. Yes. A. No, sir, I do not.

Mr. LEVINSKY.—Q. Not positively, but reasonably. A. Reasonably, $4,000.

(Testimony of John Grant.)

Q. You don't know now that there were any new boilers put into the steamer?

A. No, sir, I don't remember.

Q. Now about the hog chains. You started in to answer Mr. Frank by saying that you saw the effect of the hog chains, and I understood your answer to be interrupted. What was the purpose of hog chains? A. To hold the boat in shape.

Q. Now, if those hog chains are loosened what effect does it have upon the boat?

A. Well, she loses her shape.

Q. And when she gets out of shape, her upper works are liable to go to pieces, are they not?

A. It strains it some, yes. Mr. Frank was asking me about the effect of these chains on an uneven bottom—I don't know what caused them to carry away.

Q. But the longer a vessel is under water, the greater the damage, is it not?

Mr. FRANK.—Just argue it to the Court.

Mr. LEVINSKY.—I am not arguing it at all.

Mr. FRANK.—You are arguing it with the witness.

The COMMISSIONER.—Those are questions that we all know without any expert testimony. We all know that it takes more power to raise two pounds than it does to raise one pound. I don't think we need any expert testimony on that.

Mr. LEVINSKY.—I believe that is all for the present, except that I want the witness here this afternoon when Mr. Frank brings these figures.

(Testimony of John Grant.)

Mr. FRANK.—If that is all you want him for, you won't need him.

Q. You were in my office before the fire.

A. Yes, sir.

Q. Now, Mr. Grant, I understand you to say that you don't know how the Texas was built? You don't know anything about it, except seeing it casually? Isn't that so? A. I just saw it off and on, yes.

Q. So the figure that you make is not based upon any knowledge of what is should cost?

A. No, sir.

Q. What is that?

A. No, sir. I don't know what it ought to cost. I could go aboard of the boat and take the size of it, and figure it down, what it would cost, but I don't know.

Mr. LEVINSKY.—Do I understand you to say, now, those figures that Mr. Grant gave to you, Mr. Frank, were destroyed by the fire?

Mr. FRANK.—Certainly; all the papers were.

Mr. LEVINSKY.—So you will not produce them.

Mr. FRANK.—Certainly not.

Mr. LEVINSKY.—Q. Well, now, Mr. Grant, I ask you to try to remember—you have seen that vessel, examined it after the collision, and after she was raised, at the request of Mr. Gillis, for the purpose of determining what it would cost to repair her. Now, I ask you to refresh your memory and tell us what your figures were?

A. Well, I couldn't tell you; I am not sure.

Q. What were the figures you gave Mr. Gillis?

(Testimony of John Grant.)

Mr. FRANK.—Q. Did you give Mr. Gillis anything?

Mr. LEVINSKY.—I object to this interruption of counsel.

The COMMISSIONER.—That is a proper question.

Mr. LEVINSKY.—I should not be interrupted by counsel.

Mr. FRANK.—I object to the question on the ground that it is assuming he ever did give Mr. Gillis some figures?

The COMMISSIONER.—Ask him the question, if he gave Mr. Gillis any figures.

Mr. LEVINSKY.—Q. Did you give Mr. Gillis any figures?

A. It is so long ago I have forgotten.

Q. You gave some figures to Mr. Frank?

A. I made a statement to Mr. Frank, but I don't know what it was.

Q. You gave him the figures, did you not?

A. I gave him some figures.

Q. Were those the figures that you told Mr. Gillis you would repair that boat for after the collision?

A. I believe they were, as far as I know.

Q. When did you give Mr. Frank those figures?

Mr. FRANK.—It doesn't make any difference. Ask him what they were.

Mr. LEVINSKY.—Q. What were they?

A. Do you want the exact figures?

Q. As near as you can come to it?

(Testimony of John Grant.)

A. I have no idea.

Q. You remember now—

A. Can you remember back six years? I do not.

Q. Do you remember what you saw on the "Dauntless" after she was raised?

A. Yes, sir.

Q. Now, then, will you try to call to your mind, what it would approximately have cost to have repaired her—not what you gave, but just what it would approximately have cost to have repaired her?

A. I have no idea what it would cost to repair her, now, or what figures I gave.

Q. Well, can't you tell about? I did not ask for an accurate figure.

A. I don't know, but I might come close to it.

Q. That is all I want, pretty close to it. I do not ask the exact figures, but I want to know about. Do you remember them? A. No, sir.

Q. Did you tell Mr. C. D. Clark of the California Navigation and Improvement Company recently that the figure you gave was about $8,000?

A. I didn't tell him that was the figure I gave; I told him I thought it was somewhere around there, that was all.

Q. Somewhere around $8,000?

A. Yes, but I am not sure.

Q. But you told that to Mr. Clark recently?

A. Yes, to repair the hole.

Q. To repair the hole? A. Yes.

Q. Didn't you tell Mr. Clark to repair the steamer? A. No, sir.

(Testimony of John Grant.)

Q. Do you mean to say now that it would cost $8,000 to fix the hole three feet by four feet?

A. The damage that was done to the steamer was not only the hole.

Q. That is what I am getting at.

A. The damage that was done to her was from being in the water so long, caused by the hole.

Q. That is what I am getting at. Then, you do not mean to say that you told Mr. Clark it would take $8,000 or about that to fix the hole, but you meant the fixing of the entire steamer, didn't you?

A. No, sir.

Q. What did you mean to fix?

A. I meant to fix the hole.

Q. The one hole? A. The one hole.

Q. Yes.

A. Well, there was a lot of work to do to fix up the hole—I am talking about the shipwright work, I do not mean her cabins at all.

Q. Well, was that the figure, $8,000?

A. Somewhere around $8,000. I don't know whether it was $8,000 or $10,000; it might have been more.

Q. And might have been less?

A. Might have been.

Q. When did you give Mr. Frank those figures?

A. When?

Q. Yes.

A. I don't know just how long a time ago.

Q. How long ago—was it before the fire in San Francisco?

(Testimony of John Grant.)

A. Them figures was given shortly after she was raised.

Q. But were they given to Mr. Frank or given to Mr. Gillis? A. I think Mr. Frank had them.

Q. Did you give any figures to Mr. Gillis?

A. No, sir.

Q. You gave them to Mr. Frank?

A. Yes—I think to Mr. Frank. I was down here two or three different times; I could not tell you just what times the figures were given.

Q. Have you discussed this matter with Mr. Frank recently? A. No, sir.

Q. How long since you had a talk with Mr. Frank? A. Well, I couldn't tell you.

Q. About how long?

A. Some time before the fire.

Q. Haven't you had a talk recently with Mr. Frank? A. No, sir.

Q. Haven't you expected to be called here as a witness by Mr. Frank? A. No, sir.

Q. Didn't you tell that to Mr. Nicols, in Stockton, on the 14th of this month—

Mr. FRANK.—I object to this. I think it is entirely improper and not at all reasonable. You are evidently disappointed, after bringing down the witness—

Mr. LEVINSKY.—I am surprised and I announce now that I never spoke to the gentleman before this morning, when I had about two minutes' talk with him. I have a statement here made by Mr. Nicols.

(Testimony of John Grant.)

The COMMISSIONER.—His best judgment, as I understand it, is that the work that he would have done on that steamer to repair her would have been $8,000.

Mr. LEVINSKY.—I do not so understand it.

The COMMISSIONER.—That is what he stated.

Mr. LEVINSKY.—My proposition is what he told Mr. Clark.

Mr. FRANK.—It don't make any difference what he told Mr. Clark.

The COMMISSIONER.—The thing is the cost of the repair of that ship. He said that his work, not including the joiner work—whether the figures he gave Mr. Frank were in the nature of a contract or whether he was asked to give them, what he means by this is that it *would about* $8,000 to do his work upon that ship and put the vessel in proper shape. He seems very reluctant to state anything.

Mr. LEVINSKY.—I am surprised at the testimony of the witness.

The COMMISSIONER.—He seems afraid to testify, unless it is because he wants to be absolutely exact.

Q. You must have some opinion. All we can ask for is your best judgment or best recollection as to what the work on that steamer would cost.

A. My part of the work.

Q. And you state it is about $8,000?

A. Yes.

(Testimony of John Grant.)

Recross-examination.

Mr. FRANK.—Q. I understand your part of the work was to close up the hole in the hull?

A. The shipwright work on the steamer.

Q. That was to close up this hole in the hull?

A. Yes; to straighten the steamer up, that is, put her on the ways and put her back into the shape—that is, closing that hole.

Q. Closing that hole? A. Yes.

Mr. LEVINSKY.—Q. And that was only to close the hole, do I understand that? That is what I would like to know.

The COMMISSIONER.—He did not say that. He says he was to do the shipwright work, to put her on the ways and repair the hull. That is more than just closing up that hole.

Mr. LEVINSKY.—Q. How do you reconcile that statement with the statement made by you to Mr. Nicols on the 14th of this month, that the hull had been but slightly injured by the collision?

Mr. FRANK.—I object to that. That is fully explained by the witness' testimony. The word "slightly" is not a definite term; if anything, it is a comparative term.

Mr. LEVINSKY.—Q. How do you reconcile that statement that it would cost $8,000 to fix the hull, not do the joiner work but just your own work, when you told Mr. Nicols on the 14th of this month in Stockton that you found the hull but slightly injured? A. From the collision?

(Testimony of John Grant.)

Q. Yes.

A. I told him so, from the collision, slightly injured from the collision, by the steamer.

The COMMISSIONER.—He explained that.

Recross-examination.

Mr. FRANK.—Q. Now, with reference to this $8,000. That was not an offer or a contract or anything?

A. No, sir; it was just a rough estimate.

Q. You came to my office and I took your statement and examined you as we are examining you now? A. Yes, sir.

Q. At that time I asked you some questions about the cost of doing that particular work?

A. Yes, sir.

Q. And that is the manner in which you replied, is that it? A. Yes, sir.

The COMMISSIONER.—Q. That is not based upon any estimate or any measurements taken or anything of that sort? A. No, sir.

Q. Just a rough guess? A. That is it.

Mr. LEVINSKY.—Q. It is a rough guess now?

A. Yes.

(A recess was here taken until 2 P. M.)

AFTERNOON SESSION.

[Testimony of Charles D. Clark, for Petitioner (Recalled).]

CHARLES D. CLARK, recalled for the petitioner.

Mr. LEVINSKY.—Q. Do you know John Grant of Stockton?

(Testimony of Charles D. Clark.)

A. Yes, sir.

Q. Did you have a conversation with him recently regarding any statement that he made to Mr. Gillis in regard to what he would have charged for repairing the "Dauntless" after the collision, and after she was raised?

Mr. FRANK.—I object to that upon several grounds; first, it is an attempt to impeach their own witness, which is utterly improper and inadmissible under any circumstances; and, secondly, even if he did make such a statement of Mr. Clark, it does not prove the fact, and is, therefore, immaterial.

The COMMISSIONER.—The objection is sustained.

Mr. LEVINSKY.—Exception.

Q. Mr. Clark, do you remember the steamer "J. D. Peters"? A. Yes, sir.

Q. Had the steamer "J. D. Peters" what is known as a Texas deck? A. Yes, sir.

Q. How does the size of the Texas deck on the "Peters" compare with the size and build of the Texas deck that was on the "Dauntless"?

A. It is at least of equal build, that is, with reference to its durability and utility, and I should say it would be perhaps 20 feet longer.

Q. The one on the "Peters"? A. Yes, sir.

Q. Will you state what the Texas deck on the "Peters" cost to build?

Mr. FRANK.—This is all subject to objection.

The COMMISSIONER.—The objection is sustained.

(Testimony of Charles D. Clark.)

Mr. LEVINSKY.—Exception.

Q. Have you made efforts to obtain witnesses who were thoroughly familiar with the steamer "Dauntless," in addition to such witnesses as you have already produced, and why have you not produced them?

Mr. FRANK.—How has that anything to do with this case? Is it a suggestion that we are suppressing any testimony?

Mr. LEVINSKY.—I do not try a case that way.

Mr. FRANK.—Then I object to it absolutely.

The COMMISSIONER.—What is the object of it?

Mr. LEVINSKY.—To show good faith on our part to assist the Commissioner.

Mr. FRANK.—We take it for granted that you have done everything, and moved heaven and earth to get witnesses in this matter.

Mr. LEVINSKY.—I do not want that kind of an admission.

Mr. FRANK.—I will withdraw all the admissions. It is immaterial.

The COMMISSIONER.—What is the question?

Mr. LEVINSKY.—What efforts he has made to obtain witnesses other than those already produced.

The COMMISSIONER.—I cannot see the relevancy of it.

Mr. LEVINSKY.—An exception. That is our case.

(An adjournment was here taken until Saturday, November 23, 1907, at 10 o'clock A. M.)

[Testimony of William Tucker, for Claimant.]

Before JAMES P. BROWN, Esq., Commissioner.

Wednesday, July 22d, 1908.

WILLIAM TUCKER, called for the claimant, Union Transportation Company, sworn.

Mr. FRANK.—Q. What is your age?

A. I am 49.

Q. What is your occupation?

A. Submarine diver.

Q. How long have you been engaged in that business? A. 22 years.

Q. When you say "submarine diver," is that in connection with wrecking operations?

A. Yes, sir.

Q. How long have you been engaged in wrecking operations? A. About 21 years.

Q. Did you have anything to do with raising the steamer "Dauntless" that was sunk in the San Joaquin River by collision with the "Mary Garrett"?

A. Yes, sir, I got her up out of 45 feet of water, and took her to Stockton.

Q. Before you were at work on her who was at work on her, just before you began operations?

A. The man I succeeded was called Roach.

Q. Did you work with him while he was working also?

A. Yes, sir, I worked with him for 5 or 6 weeks I believe.

Q. And then you succeeded him in the superintendence of the work? A. Yes, sir.

(Testimony of William Tucker.)

Q. How was she brought up to the surface? By what appliances?

A. We had two barges there, one on each side of her, and four sets of timbers across her, and wires leading underneath the wreck.

Q. How many wires did you have?

A. Four.

Q. How distributed?

A. They were equal distances apart, right fore and aft of the vessel. They were placed under her where it was supposed the most weight of the vessel would come on to them.

Q. How was the weight distributed on those wires? A. Pretty evenly distributed.

Q. You say you had some timbers across from barge to barge?

A. Yes, sir, and the wires secured to the timbers. We used to sink the barges down and flood them with water within a foot of the deck. Right at the point of low water we used to tighten up on the wires, and then pump the barges out and left the tide do the rest of it. The tide would lift her and she would float up the river. We were directing her to a shallow bank by means of anchors and chains and guiding her on to the Santa Clara shoal; there was 5 feet of water there at low water.

Q. By repetition of this process at each tide you succeeded in getting her on these shoals?

A. Yes, sir.

Q. As she came up what did you do to the deck-houses as they rose up to these beams?

(Testimony of William Tucker.)

A. As the upper structure came in contact with the timbers we had to cut the housing down in order to allow the vessel to come up past the timbers.

Q. When you speak of cutting the houses down what do you mean, that you destroyed all the houses, or only cut down the width of the timbers?

A. We only cut down the width of the timbers; the houses were not in a very good condition when they came up. The stanchions underneath the flying-deck were all carried away.

Q. On which side were those stanchions carried away?

A. On the side she was struck—on the port side.

Q. And what effect did that have on the houses?

A. It caused the houses to fall down on that side. They were all leaning over to port, and nothing to support them, and racked the houses. The cabin doors were broke off.

Q. Did you find any mud in her as she came up?

A. There was a little sediment in the cabin and on the deck.

Q. What did you do with that?

A. As she came up we washed it off.

Q. Did that mud that you found in there have any effect in injuring the vessel by her weight or otherwise, as she came up?

A. No, sir, I don't think there was enough to do any damage. It may be it added a little weight on to her, but not enough to break down or destroy the house work.

(Testimony of William Tucker.)

Q. What condition did she come up, so far as her hull was concerned, with respect to injuries, outside of the collision?

A. I did not observe anything the matter with the hull. She came up all right. She did not seem to be hogged, or anything.

Q. Do you remember the loosening of the hog chains while she was being raised?

A. There were some of the hog chains that we had to cut in order to let the timbers pass.

Q. Did that have any tendency to hog the vessel at all?

A. No, sir. When these chains were cut she was on the bottom. The vessel was laying flat on the bottom. We cut the chains when we took the weight of her on the wires. She was laying evenly on the wires so as to prevent her from hogging.

Q. When you finally got her up was she hogged?

A. No, sir.

Q. What was the nature of the damage of the hole that you found in her when you got her up?

A. There was a hole cut in her on the port side forward. The deck was cut through I should think. I don't exactly remember how deep it was cut into her deck. It must have been 6 feet from the covering board, or perhaps more.

Q. In what shape?

A. The hole at the bottom close to the knuckle I covered in. I used, if I remember, planking about 12 feet long in order to give it a bearing on each side

(Testimony of William Tucker.)

of the break; the hole itself I don't remember how big it was down below. It was quite a big one. I could walk through it.

Q. As she came up was she injured any in the raising?

A. No, sir; the raising of her did not tend to injure the hull of the vessel at all. In regard to the house work the only thing that there was an injury to was in cutting it down in order to allow it to pass up through these timbers. The hull was just as good. There was no injury to the hull that I could see.

Q. I understood you to say the stanchions were knocked out on the port side, and that was careened over? A. Yes, sir.

Q. Was that any injury to her then?

A. It was injured but we did not figure it that way in raising her.

Q. Was the cutting down of the house work in the condition you found it?

A. It did not tend to break that part down. That part that was damaged by the collision was between our timbers, the house work where we cut to allow the timbers to come up was some distance on each side of that break.

Q. From your experience, Mr. Tucker, in this business, was there any other way in which she could have been raised?

A. I don't know of any other way right here on this coast; there are no appliances for raising vessels any different from what we undertook to raise her by.

(Testimony of William Tucker.)

Q. Supposing the vessel had been lying in a position where one end of her Texas deck was just above the water, and the other end of her Texas deck was submerged below the water, could any other process than the one you have indicated have been used to raise her with any success, or economically?

A. It might have been possible to put coffer-dams around her, but it would have been quite an expense. She would have been so far under water that it would require lots of strain, and take them river boats, their boilers are not covered over, and there are hatches along the deck. It is a pretty hard proposition to cover them in from the main deck. I don't know how it would have been with coffer-dams around her. I don't think I could have adopted that plan of raising her. I believed the best plan was to put the wires and use the barges.

Q. Leaving out of consideration the question of coffer-dams, could you have canvassed over any portions of the openings of the vessel, and pumped her out in that condition?

A. Not if she was so far submerged under water as that. The Texas deck, I understand, is the top of the housing?

Q. Yes. A. No, sir.

Q. That would not have been practical?

A. No, sir, not to have canvassed over the holes.

Q. Under any condition lying in the situation I have just indicated, what would you say with respect to the length of time it would have taken to have got her out?

(Testimony of William Tucker.)

A. It is a pretty hard thing to figure on the time in a job like that. There is a whole lot of chain work connected with raising a vessel under water. You cannot see what you are doing. Just the time you think you have got her you lose her. In a good many cases when working under water raising a vessel you never know when you are going to get her until you get her up.

Q. What would you say with respect to 10 days as being a probable time in which she could have been raised?

A. By the time you get your plant down on the scene of the wreck and get to work your 10 days would be up, and you could not have done nothing in 10 days with her.

Q. After you got your plant there and everything at work what have you to say with reference to 10 days then in raising her?

A. I would not like to take the job to raise her in 10 days.

Q. Do you think it would have been possible?

A. No, sir. I don't think it would have been possible for anyone to have got her up in 10 days.

Q. What has been your experience with reference to collisions, as to the time in wrecking vessels?

A. I have seen jobs where they calculate to get them up in 30 days, and they took three months. In other cases where they figured on getting the vessel up in 10 days it took 30; you cannot tell. Sometimes you strike it lucky and things go right, and she

comes up all right. There are lots of cases where, there are holes in the vessels that you cannot find or locate. You put your pumps to work on her and cannot pump her out. You have to go to work and go over the work again and try and discover these leaks and breakages, and you put on more pumps, and sometimes your pumps break down.

Q. As I understand, with reference to vessels of this class, the arrangement of her main deck where her boiler is, and things of that sort, is such that it would be impracticable in that depth of water to have canvassed them over and pumped her out?

A. Yes, sir.

Q. Is this process of building a coffer-dam around her a very expensive proceeding?

A. In many cases you have to employ a force of divers and you have got to take extra precautions to get everything tight. You have to batten all the seams and cover them with canvas and use quite a lot of precautions in order to get the things tight so that your pumps will not have too much leakage to contend with.

Q. Does this process of the coffer-dam also involve the patching or closing up of the hole underneath the water where she was damaged?

A. Yes, sir.

Q. Is that a practical thing at that depth of water?

A. In 60 feet of water you can patch up a hole all right. I don't think I would undertake to build a coffer-dam in 60 feet of water.

(Testimony of William Tucker.)

Q. I am speaking of where she lay with one end of her Texas deck submerged, as I have already indicated?

A. I understand now. One end submerged and one end out of water.

Q. I mean the Texas deck?

A. I don't know whether it would be practicable or not. It just depends on the man who has got the job, whether he considers it would be the cheapest way to go about it, or put wires under her with barges. You do not take into consideration the housing work. They go to work and tear it down in a good many cases.

Q. The building of a coffer-dam would involve the tearing away of the houses anyhow?

A. In a good many cases, yes.

Q. When you finally landed her at Stockton, what was the nature of the repairs you had made to these holes, whether temporary or otherwise?

A. Only temporary. I had planked the hole over and covered her with canvas, and then rebattened on top of the canvas with 1 by 4 battens, or 1 by 3. There was a well left in the engine-room to be covered over, and the ash-chute down in the boiler-room, that we covered in. We had to pump her 20 minutes every hour with a little 3-inch bilge-pump to keep her dry going up.

Q. You are at present in the employ of Mr. Whitelaw?

(Testimony of William Tucker.)

A. I have been employed by him on and off for the last 20 years. Sometimes I have been away from him a year or less or more.

Cross-examination.

By Mr. LEVINSKY.—Q. Do you know when it was that you began work on her yourself?

A. I don't remember the date, but I can come pretty near to it. We were to leave the city the night that the "San Rafael" was sunk in the Bay.

Q. I do not care particularly about the date. How long had she been submerged before you began work on her?

A. I had been on her before that. I went up on her at the time that a man called Delaney was trying to raise her, to put some hawsers on her cylinder-beams. He was going to try and lift her out of the hole she was in. I don't know how long she had been under water when I went to work finally the last time.

Q. Can you tell about how long?

A. No, sir; I don't know whether it was 3 or 5 months.

Q. It was several months after she had gone down?

A. I don't know. It may have been 3 months perhaps.

Q. In attempting to raise a vessel of this kind the work should be done by a man who knows his business? A. Yes, sir.

Q. Did you know Mr. Gillis, the president of the Union Transportation Company?

(Testimony of William Tucker.)

A. I never knew him until I first seen him up there.

Q. He was not what was known as a wrecker, or had experience in those matters?

A. I don't know anything about that.

Q. Do you know what attempts he was making to raise her himself?

A. I don't know. As I understand, he had a man hired from Stockton—

Mr. FRANK.—I offer the suggestion that anything the witness does not know of his own knowledge is not competent, and I shall object to it. I think the witness ought to be instructed to that effect, Mr. Commissioner, so that we may not fill the record with immaterial matters.

Mr. LEVINSKY.—I am asking the question if he knows the class of work that Mr. Gillis was doing when he was personally attempting to raise the vessel.

Mr. FRANK.—If you know of your own knowledge, Mr. Tucker, very well.

The WITNESS.—I don't know whether he was instructing the work or not. All I know about it is when I undertook the job I used my own judgment about it.

Mr. LEVINSKY.—Q. And you were a man of experience? A. Yes, sir.

Q. As you said before, it requires a man of experience for that kind of business?

A. Yes, sir, it does.

(Testimony of William Tucker.)

Q. You do not know what the condition or position of the steamer was within a week after she was sunk, do you? A. No, sir.

Q. And you are only judging from where you found her when you began your operations; that is correct, is it not?

A. What am I judging?

Q. I say, the manner and method of raising her is based upon where you found her when you began your work? A. That is irght.

Q. Do you know how far it was away from the place where she was sunk, where you found her?

A. I don't know just exactly the distance where she was on the beach. It had been pointed out to me; it might have been 500 yards.

Q. She was in some 45 feet of water at the time you began your operations?

A. Yes, sir; we got her up 15 feet I guess; she was in 62 feet of water when we first went up there.

Q. Now, it is much easier, is it not, to raise a vessel in a few days after she is sunk than after waiting some three months and she becomes soaked with water and mud which is bound to accumulate in her, is it not?

A. The water would not take much effect on her. In some cases the mud will help to put a little extra weight on her.

Q. A vessel being dragged here and there, and being tossed by waters, it injures the vessel, does it not?

(Testimony of William Tucker.)

A. If she is in a seaway, yes; if she is in shallow water where you are going to move her about it will naturally break the vessel up. In a river like where she was there was no disturbance at all, no disturbance in order to move the hull of the vessel.

Q. Was there not quite a current there?

A. Not at that time of the year, no.

Q. Three or four months prior to that time there was quite a current, was there not?

A. That I don't know. At the time we were there there was generally a good current round down the San Joaquin. I don't know about how fast it runs. The current did not have any tendency to move her while on the bottom.

Q. You say you have been in the employ of Mr. Whitelaw off and on for some 20 years?

A. Yes, sir.

Q. Mr. Whitelaw is recognized, is he not, as a man who understands the business of wrecking and raising vessels? A. Yes, sir.

Q. Did Mr. Whitelaw send you up there at any time shortly after the vessel was sunk, for the purpose of making an estimate as to the cost of raising her, or what would be necessary to be done to raise her? A. No, sir, he never sent me up.

Q. The hull, as I understand you to say, was not injured?

A. Not outside of where she was struck.

Q. Where she was struck, that was a minor injury, was it not?

(Testimony of William Tucker.)

Mr. FRANK.—I object to that. The Judge will determine that. He can describe the nature and extent of the injury.

Mr. LEVINSKY.—Q. To what extent was she injured?

A. The hole was big enough to sink her. As far as I remember right she was cut into the deck over 6 feet from the covering-board and pretty close down to the knuckle, that is, down to the turn of her bilge. She was practically flat on the bottom, but there was a knuckle piece, and there she was out down pretty close to the knuckle piece. The break was from there 6 feet from the covering board and on the deck.

Q. Was that cut widened by the waters rushing through it?

A. No, sir, the water could not make any more damage to that break.

Q. What effect would it have on a vessel dragging her around by chains, and dragging her through the water in the way you said Mr. Delaney was attempting to do?

A. In the method that they were trying to raise her at the time I was trying to put the lines round the cylinder-beam they could not do nothing. The chains they had in the first place were all condemned chains from a dredger—a clam-shell dredger. They were pretty well all worn out, and when the weight would come on the chain the barges would heel over and the chains would part.

Q. The result was that the vessel would drop down?

(Testimony of William Tucker.)

A. It never lifted the vessel. The two barges would heel over when the tide rose on them until the chains would break. They were only 7/8 chains.

Q. The vessel would drop down?

A. She would not drop at all. They had never lifted her off the bottom.

Q. This work and the manner in which they were doing it, was tending to injure the vessel, tearing the woodwork apart?

A. I did not see that it was. The chains came underneath the bottom and landed on the barges alongside of her. There were a couple of timbers in order to keep the barges in place. The chains came over the edge of the barges.

Q. If the means had been employed shortly after the vessel sunk that were employed afterwards she would have been raised very quickly and without much damage to her?

A. It depends; I don't know whether they would or not; it depends who takes hold of the vessel.

Q. I am talking about a person of your experience, or you personally.

A. In raising a vessel like that, you can only get so much of a lift on her; all the lift you can get is what the tide would give her. You would have to pull her on to the mud and get a suitable place to pull her up. Each time you lift her, you keep pulling her up.

Q. If a man of your experience, or you personally had taken charge of that vessel a few days after

(Testimony of William Tucker.)
she was sunk she would not have been very badly injured?

A. If she was in the same depth of water?

Q. Where she went down?

A. It depends upon the depth she is in. If she had been taken hold of perhaps where her decks were partly submerged, why of course it would not have taken as long to get her up, which is reasonable if she had been in 62 feet of water, otherwise perhaps she would only have been in 22.

Mr. FRANK.—Q. He is asking about the injury, whether she would have been as badly injured as when you took her out?

A. I don't know the state of the houses when she was laying in that condition. I could not see if the houses had been injured any more under water. I don't suppose she would have been injured any more.

Mr. LEVINSKY.—Q. Can you tell from your examination, if any you made, after you raised her, what particular part of the house was injured by a collision or what part of the house had given way by the strain that had been put on her in attempting to raise her by other parties?

A. I did not catch that.

Q. Read the question, Mr. Reporter.

(The Reporter reads the previous question.)

A. I could not say there was any part of the house broken that had been put on her by the strain employed by other parties in trying to raise her. The part of the house that was broken and damaged by the collision was in the wake of where the hole

(Testimony of William Tucker.)

was in her, on each side of that hole. The stanchions were all gone and the house was sunk down.

Q. For what distance was the house injured?

A. That I could not tell you exactly; I know there was quite a space there. It was broke right into the amidship part, and the sagging down in the fore part and after part was inclined to come down the same way as in any broken structure.

Q. How many stanchions were broken?

A. That I could not tell you.

Q. More than two?

A. I did not take notice. There was a space there I suppose; it might have been three times as long as this room without any support.

Q. You do not attempt to say that the bow of the other vessel striking the "Dauntless" in the manner in which she was struck would tear all these stanchions down that distance?

A. I don't know how the stanchions came out of her, but they were out of her. Whether they were caused by the collision or what it was caused by. It looked like it was caused, in the way the house was broke right where she was struck, that it was most likely done by the collision, but that I cannot say for a fact. It looked like that.

Q. Certain of the stanchions may have been broken by the collision, and they giving away and the vessel being under water this length of time, and different methods having been used in attempting to raise her, you could not say but what other parts

(Testimony of William Tucker.)

of the house had given way and where it sagged was caused by that and not by the collision?

A. I did not see the vessel after she had been struck. I did not see the state of the house until she came up. I am merely giving my opinion of how I should suppose the thing was caused. I did not see it under water because you cannot see nothing around this bay. When she came up it looked that way to me, that it was caused by the collision.

Q. But not for the full length of the vessel?

A. No, sir, the house was not all gone the full length. I am talking about in the wake of where she was struck. The other parts of the house that that was damaged it was necessary to cut the house through in order to allow the timbers to come up past.

Redirect Examination.

Mr. FRANK.—Q. In your cross-examination you were asked whether or not your opinion of the method of raising her is based upon the methods necessary in the place where you found her and began your work, does that apply to the methods that you have testified to on direct examination when the vessel was with part of her Texas deck out of water, and the other end 2 feet under water, concerning which you were asked?

A. Yes, sir, it is possible to use the same methods to get her up by putting barges alongside of her, and putting chains under her, or wires, whatever might have been necessary.

(Testimony of William Tucker.)

Q. What I mean is this: You have testified as to the methods you considered necessary when the vessel was lying in this position that I have just indicated, with one end of her Texas deck partly out of water, and the other 2 feet under water. That is not based on any conditions as you found her when you went to work on her, is it?

A. As I understand, you mean to say the same way of raising her would have been actually the same?

Q. Yes.

A. That is the way I should have raised her, by putting wires under her.

Q. Did I understand you to say on your direct examination that the mud that was of any extra weight did not damage her any in bringing her up?

A. No, sir, it is a light sediment that floats around in that river. You cannot call it mud altogether. It is a kind of a brownish sediment. I think there was perhaps 4 or 5 inches of sediment stuck around her. It is not the same deposit that you get from the bay.

Q. That you washed out as she came up?

A. We used a hose and washed it out as it came up. There may have been a little left in when we took her to Stockton. Taking the hull of the vessel the amount of mud did not amount to anything.

Q. As I understand you, the hull came up in good condition except for the breaks made by the collision, and the houses came up in good condition except for the sagging and breaking made by the break-

ing of the stanchions on the port side concerning which you have testified, and the places where it was necessary to cut them down in order to raise her?

A. That is right.

Q. This sagging of the houses of which you have spoken on your cross-examination, I understood you to say that not only did they sag towards the port where the stanchions were gone, but also from forward, aft, and aft forward, by reason of the stanchions being gone? A. Yes, sir.

Q. Like any house where one end is knocked out it will come in?

A. It will come down that way, at the same time it will incline to port.

Q. From the examination of the break, that you made of it, in your experience you would come to the conclusion that the damage was done at the time of the collision?

Mr. LEVINSKY.—I object to the leading proposition.

Mr. FRANK.—I am repeating the effect of the cross-examination.

Mr. LEVINSKY.—We submit it is not a repetition of the cross-examination. The proctor is making a statement of his views, and asking the witness if it is not so. It is leading and suggestive.

Mr. FRANK.—I will change the question.

Q. As I understand you, on your cross-examination, from the examination that you made of the vessel after she was raised, and your experience in such business, you concluded that the damage to the deck-

(Testimony of William Tucker.)

house was damage done by the collision and not due to anything that happened to the vessel after her submersion?

Mr. LEVINSKY.—I object to that upon the ground that what the proctor may believe or assume is not testimony of the witness, but is simply attempting to change the form of the testimony. It is not based on the testimony of the witness. He testifies he could not say how much of that house was damaged by collision and how much by other things.

Mr. FRANK.—Read the question, Mr. Reporter.

(The Reporter reads the question.)

A. That is what I said.

Recross-examination.

Mr. LEVINSKY.—Q. I understand you to say you did have to shovel mud out of the hull?

A. Out of the cabin, yes. We shoveled a little sediment out of it, and washed it out as it came up.

Q. That added some weight to it?

A. It certainly increased the weight, yes.

Q. And the current would add to the injury to the superstructure?

A. No, sir, I don't think the current had anything to do with injuring the house.

Q. You do not know of your own knowledge how much of that house, as you call it, was injured by the collision, and what injury was sustained by other causes after the vessel sunk?

A. The house to the wake of the break in the way it looked to me, it sagged towards the port side, and

(Testimony of William Tucker.)
the stanchions were all gone underneath. It looked to me as if it was done by the collision.

Q. Could the bow of the vessel striking where this vessel struck have broken every stanchion for the distance you speak of? A. It is possible.

Q. But not very probable?

A. I don't know how that vessel got clear of the other vessel after she got clear. She may have swung alongside and knocked down the stanchions.

Q. Assuming that the testimony of those who were there at the time of the collision was to the effect that two stanchions were broken by the collision then the other damage of which you speak would be caused by other causes?

A. I don't know what it was caused by. It looked to me like it was done by the collision, that she was struck there, that is, that the house was broken away. There is a pilot-house there, and from the rail into the amidship part of it was all gone right in that particular place where the break was, and I would naturally suppose it was done by the blow that she got.

Q. That is simply your supposition of it?

A. That is what I suppose.

Mr. FRANK.—That closes our case.

Testimony closed.

[Stipulation Relative to Testimony Taken Before Commissioner Manley, etc.]

The Commissioner asked if the parties would stipulate that the testimony taken in this matter upon

the reference to Commissioner Manley should be treated as introduced before Commissioner Brown, and it was agreed by the parties that it should be treated in the manner usual in this court in such instances. The Commissioner observed that it was usual in such instances to so treat the testimony, whereupon the testimony was closed.

[Stipulated Finding Relative to Goods, etc., Described in Answer of R. L. Scott.]

[Title of Court and Cause.]

STIPULATION FOR ALLOWANCE OF CLAIM OF R. L. SCOTT.

It is hereby stipulated, that James P. Brown, the Commissioner to whom the above-entitled matter has been referred, may find that the goods, wares, and merchandise described in the Answer of R. L. Scott, was freight being carried on said steamer "Mary Garratt," at the time of the loss of said steamer, and that said merchandise was a total loss, and that the value of said merchandise set out in said answer is, and was at the time of the loss of the said steamer, the true value thereof.

Dated August 12th, 1908.

NATHAN H. FRANK,

Proctor for Union Transportation Company, Owners of the Steamer "Dauntless."

ARTHUR L. LEVINSKY,

Proctor for California Navigation and Improvement Company.

OLNEY & OLNEY,

Proctor for Peter Musto Company.

PILLSBURY, MADISON & SUTRO,

Proctors for R. L. Scott.

[Stipulated Finding Relative to Merchandise Described in Answer of The Peter Musto Company.

[Title of Court and Cause.]

STIPULATION FOR ALLOWANCE OF CLAIM OF PETER MUSTO COMPANY.

It is hereby stipulated that James P. Brown, the Commissioner to whom the above-entitled matter has been referred, may find that the merchandise described in the answer of the Peter Musto Company, was freight being carried on said steamer "Mary Garratt," at the time of the loss of said steamer, and that said merchandise was a total loss, and that the value of said merchandise set out in said Answer is and was at the time of the loss of the said steamer the true value thereof.

NATHAN H. FRANK,

Proctor for Union Transportation Company, Owners of the Steamer "Dauntless."

ARTHUR L. LEVINSKY,

Proctor for California Navigation and Improvement Company.

PILLSBURY, MADISON & SUTRO,

Proctor for R. L. Scott.

Dated August 5th, 1908.

[Endorsed]: Presented & Filed in open Court. Sept. 5, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Objections and Exceptions of the California Navigation & Improvement Co. to Report of U. S. Commissioner Brown.]

[Title of Court and Cause.]

To Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, in and for the Northern District of California:

Now comes California Navigation & Improvement Company, and hereby objects and excepts to the report of the Honorable Commissioner, James P. Brown, made herein, and by him filed on the fifth day of September, 1908, for the following causes, that is to say:

First: Because said Commissioner has not in his said report allowed it any credit for the loss and damage to the steamer "Dauntless" by reason of the carelessness and negligence of its owner in attempting to raise said vessel, as appears from the testimony in this cause.

Second: Because said Commissioner has not, in his said report, deducted from the damage to said vessel "Dauntless," any amount or sum for damage or injury caused to her by the length of time that her owners permitted her to remain beneath the waters, as appears from the testimony in this cause.

Third: Because said Commissioner has not in his said report fixed or determined the sum or amount of money that should have restored the steamer "Dauntless" to her former condition after she was raised, as appears from the testimony in this cause.

Fourth: Because said Commissioner has not in his said report determined or ascertained what it would have cost to have placed the steamer "Dauntless," after she was raised, in the same condition in which she was at the time that she sunk, as appears from the testimony in this cause.

Fifth: Because said Commissioner has found the value of the steamer "Dauntless," at the time she was sunk, but has not ascertained or found what it would have cost to have restored her to her former condition.

Sixth: Because said Commissioner has not followed the rule of law regarding injuries of the character, in the manner, and according to the rules of admiralty governing proceedings like the one now under consideration.

Seventh: Because it is necessary, and required by law, that said Commissioner should have determined and found the cost of placing the steamer "Dauntless" in the same condition in which she was prior to the collision, if evidence of that nature were offered by the claimant herein, and if any such evidence was by said claimant offered, then the report of said Commissioner should have been only upon such evidence as was offered by said claimant, which appears from the evidence to have been the sum of five thousand five hundred (5,500) dollars, the cost of raising said vessel, and not otherwise.

Eighth: Because the report of said Commissioner is excessive in the matter of damages, as appears from the evidence in this cause, especially by reason of the fact that he has considered and allowed loss

and damage by reason of the carelessness and negligence of the owner of said vessel "Dauntless" during the time that she was neglected by said owner.

Wherefore, said California Navigation & Improvement Company respectfully requests that the report of the Honorable Commissioner herein be not approved for any other or greater sum in the matter of damages than the sum of five thousand five hundred (5,500) dollars.

F. D. NICOL,
ARTHUR L. LEVINSKY,
Proctors for California Navigation & Improvement Company.

[Endorsed]: Filed Sept. 10, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Overruling Exceptions of the California Navigation & Improvement Co. to Report of U. S. Commissioner Brown.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Friday, the 9th day of April, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,108.

In re Petition of CALIFORNIA NAVIGATION AND IMPROVEMENT COMPANY, etc., for Limitation of Liability.

The Exceptions of the California Navigation and Improvement Company, to the Report of Jas. P.

Brown, U. S. Commissioner, herein, having been heretofore submitted to the Court for decision, now after due consideration had thereon, the Court files its written Memorandum Opinion, and by the Court ordered that said Exceptions be, and the same are hereby overruled, and further ordered that said report be, and the same is hereby confirmed. Further ordered that all parties found by said report to have sustained damage in said collision are entitled to interest thereon, from the date of the commencement of this proceeding. Further ordered that such a Decree be entered.

[Memorandum Opinion on Exceptions of The California Navigation & Improvement Co. to Report of U. S. Commissioner Brown.]

[Title of Court and Cause.]

DE HAVEN, District Judge.—Upon consideration of the exceptions of the California Navigation and Improvement Company, to the report of Jas. P. Brown, U. S. Commissioner, filed on the 5th day of September, 1908, in which he finds that the steamer "Dauntless," in the collision between that vessel and the steamer "Mary Garrett," was damaged in the sum of $35,834. are overruled, and the said report is confirmed. All of the parties found by said report to have sustained damage in said collision are entitled to interest thereon, from the date of the commencement of this proceeding.

Let such a decree be entered.

[Endorsed]: Filed Apr. 9, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Final Decree.

At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom of said Court, in the City and County of San Francisco, State of California, on the 14th day of April, 1909.

Present, the Honorable JOHN J. DE HAVEN, Judge of the United States District Court for the Northern District of California:

This cause coming on regularly to be heard on exceptions to the report of the Commissioner appointed to take testimony and to ascertain and report the amount of damage sustained by the several claimants therein; and the several parties having been heard, and due deliberation having been had in the premises:

And it appearing by said report that the claimant Union Transportation Co. has suffered loss and damage by reason of the said collision in the sum of thirty-five thousand eight hundred and thirty-four (35,834) dollars;

That the claimant Peter Musto Co., has suffered loss and damage by reason of said collision in the sum of four hundred and eighty-eight and 41/100 (488.-41) dollars;

That the claimant R. L. Scott has suffered loss and damage by reason of the said collision in the sum of eight hundred and four and 83/100 (804.83) dollars;

Now, it is ordered, adjudged and decreed, that the said exceptions to said report of said commissioner be, and the same are, hereby overruled, and the said report is hereby in all things confirmed;

It is further ordered, adjudged and decreed, that the said several claimants do have and recover in this proceeding the said several amounts so reported by said commissioner as the amounts of the loss and damage suffered by them rsepectively with interest thereon from September 10th, 1903, together with their costs herein to be taxed.

It further appearing that an interlocutory decree was duly made and entered herein on the 18th day of January, 1905, wherein and whereby it was decreed that said petitioner was entitled to the benefit of the limitation of liability provided by sections 4281, 4282, 4283, 4284, and 4285 of the Revised Statutes of America and the Acts amendatory thereof, and that appraisement of said steamer "Mary Garrett" and her freight pending at the time of said collision was made, wherein and whereby the value of said steamer and her said freight pending was fixed at the sum of thirty-three thousand one hundred and fifty and 58/100 (33,150.58) dollars;

That thereupon said petitioner did, on the 2d day of February, 1904, file a stipulation in admiralty with the Fidelity & Deposit Company of Maryland, a corporation, as surety, conditioned that it, said petitioner, and said surety should abide by all orders of the Court, interlocutory or otherwise, and pay the amounts awarded by the final decree rendered by this Court, or by any appellate court if an appeal inter-

vene, with interest, said petitioner and surety then and there agreeing and consenting that in case of default or contumacy on their part, execution may issue against their goods, chattels and lands;

And it appearing further that the value of said steamer and her freight pending, so fixed as aforesaid, together with interest thereon from said September 10th, 1903, to the date of this decree, amounts to the sum of forty-four thousand two hundred and seventy-seven and 92/100 (44,277.92) dollars;

Now, therefore, it is further ordered, adjudged and decreed, that the several amounts hereinbefore awarded the several claimants be paid pro rata out of *of* the said sum of forty-four thousand two hundred and seventy-seven and 92/100 (44,277.92) dollars, to wit;

To the Union Transportation Co. the sum of forty-two thousand seven hundred and thirty-five and 65/100 (42,735.65) dollars; with interest from the date of this decree;

To the Peter Musto Company the sum of five hundred and eighty-two and 45/100 (582.45) dollars, with interest from the date of this decree;

To R. L. Scott the sum of nine hundred and fifty-nine and 82/100 (959.82) dollars, with interest from the date of this decree;

It is further ordered that a summary judgment be, and the same is, hereby entered against the said California Navigation & Improvement Co., principal, and the Fidelity & Deposit Company of Maryland, a corporation, the surety, for the said several sums last hereinabove mentioned, and that the said several

claimants have execution thereon for the said respective amounts so ordered paid to them, together with their costs, to satisfy this decree.

JOHN J. DE HAVEN,
Judge.

Ordered that execution on foregoing decree be stayed for fifteen days from this 14th day of April, 1909.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Apr. 14, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Assignment of Errors.

Now comes the California Navigation & Improvement Company, a corporation, the petitioner for limitation of liability herein, and says that in the record herein, including the final decree herein and the report of Commissioner James P. Brown, filed herein on the 5th day of September, 1908, there is manifest and material error, and the said petitioner and appellant now makes, files and presents the following assignment of errors, upon which it relies, as follows, to wit:

1.

That the Court erred in overruling the exceptions of said petitioner and appellant to said report of said commissioner James P. Brown, and in overruling any of said exceptions.

2.

That the Court erred in confirming the report of said commissioner, or any part thereof.

3.

That the Court erred in finding that the claimant, Union Transportation Company, had or has suffered loss and damage or loss or damage, by reason of the collision of the "Dauntless" with the said "Mary Garrett" in the sum of $35,834, or in any other sum whatsoever, or at all.

4.

That the Court erred in finding that the claimant, Union Transportation Company, had or has suffered loss and damage or loss or damage, by reason of the collision of the "Dauntless" with the said "Mary Garrett," in any sum of money in excess of $5,500, the cost of raising said "Mary Garrett," with interest from the date of the expenditure by said Union Transportation Company, of said sum.

5.

That the Court erred in decreeing that said claimant, Union Transportation Company, was entitled to be paid interest on said sum of $35,834 from and after September 10th, 1903, or any interest whatsoever.

6.

That the Court erred in decreeing that said claimant, Union Transportation Company, was entitled to be paid interest on the said sum of $35,834 from September 10, 1903 (the date of the commencement of this proceeding) or from any earlier date than the filing herein of the stipulation under Admiralty Rule 54, namely January 23, 1904.

7.

That the Court erred in awarding interest on the sum of $33,150.58, which last-mentioned sum constituted and was the amount of the stipulation in admiralty filed in pursuance of Admiralty Rule 54—said sum being the amount of the appraisement herein of said steamer "Mary Garrett" and her freight pending at the time of said collision.

8.

That the Court erred in awarding any interest on the sum of $33,150.58, which last-mentioned sum constituted and was the amount of the stipulation in admiralty filed in pursuance of Admiralty Rule 54 (said sum being the amount of the appraisement herein of said steamer "Mary Garrett" and her freight pending at the time of said collision) from an earlier date than the filing of said stipulation.

9.

That the Court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said Commissioner, and the said Commissioner erred in that they failed to recognize or allow any credit for the loss and damage to the steamer "Dauntless," by reason of the carelessness and negligence of Union Transportation Company in attempting to raise said vessel.

10.

That the Court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said Commissioner, and the said Commissioner erred in that they failed to deduct from the damage found to have been suffered by the "Daunt-

less," any amount or sum for damage or injury caused to said vessel last mentioned by the length of time she was permitted to remain beneath the waters.

11.

That the Court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said Commissioner, and the said Commissioner erred in that they have not fixed or determined the amount or sum of money that would have been necessary or proper to expend in the restoration of the steamer "Dauntless" to her former condition and after said vessel was raised.

12.

That the Court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said Commissioner, and the said Commissioner erred in that they have not determined or ascertained what it would have cost to have placed the steamer "Dauntless," after she was raised, in the same condition in which she was at the time that she sank.

13.

That the Court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said Commissioner, and the said Commissioner erred in that while the value of the steamer "Dauntless" at the time she was sunk, has been found, nevertheless it has not been ascertained or found what it would have cost to have restored said steamer to the condition in which she was before she was sunk.

14.

That the Court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said Commissioner, and the said Commissioner erred in that the award of damages is excessive.

15.

That the Court erred in holding (if it so held) that a total loss of the "Dauntless" had been admitted by the pleadings herein.

16.

That the Court erred in finding (if it so found) that the "Dauntless" was a total loss.

17.

That the Court erred in failing to find that the evidence did not show that the "Dauntless" was a total loss.

18.

That the Court erred in failing to hold that the neglect, delay and negligence of Union Transportation Company, in permitting the "Dauntless" to remain sunken and unraised, barred the said Union Transportation Company of any right of recovery in this proceeding.

19.

That the Court erred in finding that the neglect, delay and carelessness of Union Transportation Company, in protecting and salving the said "Dauntless" did not increase the damage sustained by the "Dauntless" by the said collision.

20.

That the Court erred in failing to find that the

neglect, delay and carelessness of Union Transportation Company, in protecting and salving the said "Dauntless," did not increase the damage sustained by the "Dauntless" by the said collision.

21.

That the Court erred in failing to find that the cost of raising and restoring the "Dauntless" would have been less than her value after the restoration was made.

22.

That the Court erred in awarding any damages in favor of Union Transportation Company by reason of loss or damage to the "Dauntless," inasmuch as there is no evidence in the record to show what it would have cost to have raised and restored the "Dauntless."

23.

That the Court erred in applying the measure of damages it did, in the absence of a showing that the cost of raising and restoring the "Dauntless" would have exceeded her value after the restoration was effected.

24.

That the Court erred in taking the original cost of the "Dauntless," her Texas Deck and furnishings, less deterioration up to the time of the collision, as a basis for estimating her sound value just prior to the collision.

25.

That the Court erred in failing to take the market value of the "Dauntless" just prior to the time of

the collision as a basis for estimating her sound value at said time.

26.

That the Court erred in failing to take into consideration the fact that Union Transportation Company did nothing, so far as this record shows, to ascertain the cost of raising and restoring the "Dauntless."

27.

That the Court erred in finding that the proper cost of raising the "Dauntless" was $5,500 or any other sum in excess of $2,000.

28.

That the Court erred in failing to find that the method of raising the "Dauntless" and bringing her to Stockton did not increase the damage which was suffered by her directly in the collision with the "Mary Garrett."

29.

That the Court erred in failing to find that Union Transportation Company was so negligent and indifferent in the matter of the salving of the "Dauntless" as to disentitle the said company to recover any damages.

30.

That the Court erred in finding that the original cost of the "Dauntless," without the Texas deck and furnishings, was $51,000, or any other sum, as there was no sufficient evidence before the Court from which such or any original cost could be estimated.

31.

That the Court erred in finding that the original cost of the Texas deck and furnishings subsequently added to said "Dauntless" was $15,000, or any other sum, as there was no sufficient evidence before the Court from which such or any original cost could be established.

32.

That the Court erred in finding that the "Dauntless," as originally built, with subsequent addition of the Texas deck and furnishings, cost $66,000 or any other sum, as there is no sufficient or competent evidence to prove said original cost.

33.

That the Court erred in finding that the original cost of the "Dauntless," together with the Texas deck and furnishings, was in excess of the sum of $47,500.

34.

That the Court erred in finding that the sound value of the "Dauntless" just prior to the collisiou, together with Texas deck and furnishings, exceeded the sum of $20,000.

35.

That the Court erred in accepting exclusively hearsay testimony as to the original cost of the "Dauntless" and discarding outnumbering witnesses, familiar with the value of steamboats, as to the value of the "Dauntless" just prior to the collision.

36.

That the Court erred in finding that the "Dauntless" had depreciated only 33 1/3 per cent or any other less percentage than 50 per cent.

37.

That the Court erred in finding that the "Dauntless" had been well kept up.

38.

That the Court erred in failing to find that the "Dauntless" had not been well kept up.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, the said petitioner, California Navigation & Improvement Company, appellant herein, files herein and presents the same to said Court and prays that such disposition be made thereof as is in accordance with law and the Statutes of the United States, in such case made and provided, and petitioner and appellant herein prays that no damages be allowed the said Union Transportation Company.

CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY,
By A. L. LEVINSKY,
PAGE, McCUTCHEN & KNIGHT,
Its Proctors.

[Title of Court and Cause.]

Supplementary Assignment of Errors.

Now comes California Navigation & Improvement Company, a corporation, the petitioner for limitation of liability herein, and files this its supplement-

ary assignment of errors and says that in the record herein there is manifest and material error, and the said appellant now makes, files and presents the following additional assignment of errors, on which it also relies, as follows, to wit:

1.

That the Court erred in deciding that the collision between the "Dauntless" and the "Mary Garrett" was not caused by any fault or negligence on the part of the officers or crew of the "Dauntless," but was caused by the negligence in the management and navigation of the "Mary Garrett" by her officers and crew.

2.

That the Court erred in failing to find that the collision was wholly caused by negligence on the part of the officers and crew of the "Dauntless" in the management and navigation of said "Dauntless."

3.

That the Court erred in failing to find that the collision was caused by the joint negligence of the officers and crew of the "Dauntless" and of the officers and crew of the "Mary Garrett," and erred in failing to decree that the damages to the "Dauntless" and her cargo claimants be divided equally between petitioner and Union Transportation Company, the owner of the "Dauntless."

Wherefore, in order that the foregoing supplementary assignment of errors may be and appear of record, the said petitioner, California Navigation &

Improvement Company, appellant therein, files herein and presents the same to said court and prays that such disposition be made thereof as is in accordance with law and the statutes of the United States, in such case made and provided, and petitioner and appellant herein prays either (1) that no damages be allowed said Union Transportation Company or that (2) the damages decreed herein be divided equally between Union Transportation Company and said California Navigation & Improvement Company.

CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY.

By A. L. LEVINSKY, and
PAGE, McCUTCHEN & KNIGHT,
Its Proctor.

Receipt of a copy of the within Supplemental Assignment of Errors is hereby admitted this 31st day of August, 1909, not waiving any right of objection to the filing of the same.

NATHAN H. FRANK,
CAMPBELL & METSON,
Proctors for Union Transportation Co.
OLNEY & OLNEY,
Proctors for
PILLSBURY, MADISON & SUTRO,
p. W. T. B.
Proctors for

[Endorsed]: Filed Sep. 2, 1909. Jas. P. Brown, Clerk.

Service of the within Assignment of Errors, and receipt of a copy is hereby admitted this 3d day of August, 1909.

NATHAN H. FRANK,
CAMPBELL, METSON & CAMPBELL,
Proctors for Union Transportation Co.,
OLNEY & OLNEY,
Proctors for Peter Musto Company.
PILLSBURY, MADISON & SUTRO,
per T. B.
Proctors for R. L. Scott.

[Endorsed]: Filed Aug. 4, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Notice of Appeal.

To Union Transportation Co., and to Nathan Frank, Esq., Messrs. Campbell, Metson & Campbell and J. H. Budd, Esq., its Proctors:

To Peter Musto Company and to Messrs. Olney & Olney, its Proctors:

To R. L. Scott, Esq., and to Messrs. Pillsbury & Madison, his Proctors:

You and each of you are hereby notified that California Navigation and Improvement Company, a corporation, the petitioner named above, intends to, and does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree of the United States District Court, for the Northern District of California, and from the

whole thereof, made and entered in the above entitled proceeding on the 14th day of April, 1909.

Dated May 10, 1909.

A. L. LEVINSKY,
PAGE, McCUTCHEN & KNIGHT,
Proctors for Petitioner and Appellant.

Service of the within Notice of Appeal and receipt of a copy is hereby admitted this 10th day of May, 1909.

CAMPBELL, METSON & CAMPBELL,
JAS. H. BUDD,
NATHAN H. FRANK,
Proctors for Union Transportation Co.,
OLNEY & OLNEY,
Proctors for Peter Musto Co.,
PILLSBURY, MADISON & SUTRO,
Proctors for R. L. Scott.

[Endorsed]: Filed May 11, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Stipulation and Order (Filed August 7, 1909) as to Exhibits.]

[Title of Court and Cause.]

It is hereby stipulated between the parties hereto, that the undernoted original exhibits in the above-entitled proceeding may be withdrawn from the files herein by the Clerk of this Court for the purpose of transmitting same with the Apostles on Appeal to be hereafter filed in the Circuit Court of Appeals, Ninth Circuit.

(1) Petitioner's Exhibit No. 1, introduced in evidence upon the trial of said action before the Court, being Certificate of Inspection of the Steamer "Mary Garratt," dated January 9th, 1901.

(2) Petitioner's Exhibit No. 1, now attached to the Report of Commissioner James P. Brown, which said report was presented and filed September 5th, 1908, the said exhibit being a photograph.

(3) Claimant's Exhibit No. 1, now attached to the report of Commissioner James P. Brown, which said report was presented and filed September 5th, 1908, the said exhibit being a photograph.

A. L. LEVINSKY,
PAGE, McCUTCHEN & KNIGHT,
Proctors for Petitioner and Appellant, California Navigation & Improvement Company.
NATHAN H. FRANK,
CAMPBELL, METSON & CAMPBELL,
Proctors for Claimant, Union Transportation Company.
OLNEY & OLNEY,
Proctors for Claimant, Peter Musto Company.
PILLSBURY, MADISON & SUTRO,
Proctors for Claimant, R. L. Scott.

It is so ordered.

JOHN J. DE HAVEN,
Judge.

August 7, 1909.

[Endorsed]: Filed Aug. 7, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

[Stipulation and Order (Filed August 31, 1909) as to Exhibits.]

[Title of Court and Cause.]

It is hereby stipulated between the parties hereto that the undernoted original exhibits in the above-entitled proceeding may be withdrawn from the files herein by the clerk of this court for the purpose of transmitting same with the apostles on appeal to be hereafter filed in the Circuit Court of Appeals, Ninth Circuit:

(1) Claimant, Union Transportation Company's Exhibit No. 1, introduced in evidence upon the hearing of said proceeding before the Court, filed January 16, 1904, being a map of the San Joaquin River.

(2) Petitioner's Exhibit No. 3, introduced in evidence upon the hearing of said proceeding before the Court, filed June 17, 1904, being a plan of the steering gear of the "Mary Garrett."

A. L. LEVINSKY,
PAGE, McCUTCHEN & KNIGHT,
Proctors for Petitioner and Appellant, California Navigation & Improvement Company.
NATHAN H. FRANK,
CAMPBELL, METSON & CAMPBELL,
Proctors for Claimant, Union Transportation Company.
OLNEY & OLNEY,
Proctors for Claimant, Peter Mutso Company.
PILLSBURY, MADISON & SUTRO,
p. W. T. B.
Proctors for Claimant, R. L. Scott.

It is so ordered.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Aug. 31, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

[Title of Court and Cause.]

Stipulation and Order [Filed June 10, 1909] Extending Time to File Apostles.

It is hereby stipulated by and between the respective parties hereto, that California Navigation & Improvement Company, a corporation, appellant herein, may have and it is hereby granted, to and including the 10th, day of July, 1909, within which to procure to be filed in the United States Circuit Court of Appeals, for the Ninth Circuit, the Apostles on Appeal in the above-entitled matter, certified by the Clerk of the United States District Court for the Northern District of California.

Dated June 9, 1909.

NATHAN H. FRANK,
CAMPBELL, METSON & CAMPBELL,
J. H. BUDD,
Proctors for Union Transportation Company.
OLNEY & OLNEY,
Proctors for Peter Musto Company.
PILLSBURY, MADISON & SUTRO,
Proctors for R. L. Scott.

The foregoing stipulation having been entered into, and good cause appearing therefor,

It is hereby ordered, that California Navigation & Improvement Company, a corporation, appellant herein, may have, and it is hereby granted, to and including the 10th day of July, 1909, within which to

procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal, in the above-entitled matter, certified by the Clerk of the United States District Court for the Northern District of California.

Dated June 10th, 1909.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Jun. 10, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Stipulation and Order [Filed July 12, 1909] Extending Time to File Apostles.

It is hereby stipulated, by and between the respective parties hereto that California Navigation and Improvement Company, a corporation, appellant herein, may have, and it is hereby granted, to and including the 15th day of July, 1909, within which to procure to be filed in the United States Circuit Court of Appeals, for the Ninth Circuit, the Apostles on Appeal in the above-entitled matter, certified by the Clerk of the United States District Court for the Northern District of California.

Dated July 10, 1909.

CAMPBELL, METSON & CAMPBELL,
NATHAN H. FRANK,
Proctors for Union Transportation Company.
OLNEY & OLNEY,
Proctors for Peter Musto Company.
PILLSBURY, MADISON & SUTRO,
per. T. B.
Proctors for R. L. Scott.

The foregoing Stipulation having been entered into, and good cause appearing therefor,

It is hereby ordered, that California Navigation and Improvement Company, a corporation, appellant herein, may have, and it is hereby granted to and including the 10th day of August, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal in the above-entitled matter certified by the Clerk of the United States District Court for the Northern District of California.

Dated July 12th, 1909.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jul. 12, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Order [Dated July 14, 1909] Extending Time to File Apostles.

Upon reading the affidavit of W. S. Burnett, hereunto annexed and good cause appearing therefor, it is hereby ordered that California Navigation & Improvement Company, a corporation, the above-named appellant, may have thirty (30) days, from this date within which to file Apostles on Appeal, certified by the Clerk of the District Court (including Assignment of Errors), in the above-entitled cause, in the Circuit Court of Appeals, for the Ninth Circuit.

Dated July 14, 1909.

MORROW,
Judge.

[Affidavit of W. S. Burnett.]

[Title of Court and Cause.]

State of California,
City and County of San Francisco,—ss.

W. S. Burnett, being first duly sworn, deposes and says:

That he is and was at all times herein mentioned a member of the firm of Messrs. Page, McCutchen & Knight, proctors for the appellant above named. That said cause above mentioned is now pending on appeal in the above-entitled court from the final decree made and entered in the District Court of the United States, for the Northern District of California, in the said proceeding numbered 13,107, in the records of said Court, and entitled therein as follows: "In the matter of the Petition of California Navigation & Improvement Company, owner of Steamer 'Mary Garratt,' for Limitation of Liability."

And that affiant is and was at all times herein mentioned licensed to practice before the above-entitled Court. That said final decree in the said cause was made and entered on the 14th day of April, 1909, and execution stayed thereon for fifteen (15) days. That thereafter such execution was stayed by orders of the Court duly made and entered until the 11th day of May, 1909, when appeal was perfected to the above-entitled Court, by the filing of a notice of appeal and bond staying execution pending the determination of said appeal. That affiant's

said firm only became of counsel in said cause after the United States Commissioner had made and filed his report on reference to ascertain and report the damages suffered by the claimants therein, (the appellees herein), and after a decree had been made granting to California Navigation & Improvement Company a limitation of its liability. That as such counsel affiant's firm, through Charles Page, Esq., prepared a written brief in support of the exceptions theretofore prepared by A. L. Levinsky, Esq., to the report of the said United States Commissioner. That the said Levinsky has been proctor for said California Navigation & Improvement Company since the commencement of the above proceeding, but in the matter of the taking this appeal he has relied solely upon affiant's firm and that the said Levinsky ceased about three weeks ago to further represent California Navigation & Improvement Company as its general counsel or proctor in this cause, though formal substitution has not been made herein. That affiant and all the members of affiant's firm are wholly unfamiliar with said cause. That the said Charles Page, Esq., before the entry of said final decree and before the Court made its order affirming said Commissioner's report and overruling said exceptions, was compelled by ill-health to and did leave the United States of America, and by reason thereof, is still absent therefrom, but is expected in California, sometime in October next. That since the 10th day of June, 1909, time within which to file Apostles on Appeal herein has been granted by stipulation from

opposing counsel, Nathan H. Frank, Esq., and other counsel whose interest in said appeal is trivial, but that he now refuses to extend said time unless affiant's firm undertake that said cause will be on the calendar for hearing and will be argued during the October term of the Circuit Court of Appeals. That in the month of May, 1909, and prior to the 22d day thereof, affiant interviewed said Nathan H. Frank, Esq., to ascertain if he would stipulate on behalf of his clients to the omission of certain parts of the record, (to be certified by said District Court and filed with the above-entitled Court), concerning issues as to which California Navigation & Improvement Company did not controvert the property of the rulings of the said District Court, but the said Frank refused so to do, claiming that it was his intention to file a cross-appeal and contest every matter possible.

That thereupon and prior to ordering such testimony affiant felt it incumbent upon him to call the attention of the said Levinsky to the expense that would be entailed on his client in preparing such record, and on May 22d, he wrote to the said Levinsky at Stockton advising him thereof. That a rough estimate of the cost of preparing said record in the District Court and Circuit Court of Appeals is in excess of eleven hundred (1100) dollars. That the record is a very large one and in addition to the pleadings on file, there are the following documents, as part of the record:

Testimony in the trial, 141 pages.

Commissioner's report on appraisement, "Mary Garratt," 101 pages;

Testimony taken on reference before U. S. Commissioner Brown, after the decree was made determining that, California Navigation & Improvement Company was entitled to limitation, 239 pages.

That shortly thereafter the said Levinsky advised affiant that said appeal should nevertheless be taken. And affiant took under consideration some method by which a proceeding might be had in said District Court looking to a diminution of the record.

That thereafter on or about the 17th day of June, 1909, affiant prepared and had delivered to James P. Brown, Esq., Clerk of the United States District Court, a letter of which the following is a copy:

"June 17, 1909.

James P. Brown, Esq., Clerk of the U. S. District Court, Northern District of California, U. S. Court House and Post office Bldg., 7th & Mission Streets, San Francisco.

'Mary Garratt' No. 13,108.

Dear Sir: As the records of your Court in this cause will disclose, we contemplate taking an Appeal in this case to the U. S. Circuit Court of Appeals. As at present advised, we also contemplate making some appropriate motion looking to a diminution of the record that need be carried up, but there can be no question that we will need certified copies in the record you transmit to the Clerk of the United States Circuit Court of Appeals, as undernoted, and we therefore authorize and direct you to make such copies of said documents, to-wit:

"(1) Transcript of the Testimony taken in the above-entitled action on Thursday, June 16, 1904, and Friday, June 17, 1904, and filed in said cause on June 27, 1904.

(2) Report of James P. Brown, United States Commissioner on reference, presented and filed in open Court September 5, 1908.

Yours very truly,

PAGE, McCUTCHEN & KNIGHT,

A. L. LEVINSKY,

Proctors for Petitioner and Appellant."

That affiant is advised by the office of said Clerk last mentioned, that at this date, practically no progress has been made in the preparation of the record in said cause, owing to the congested condition in said office caused by several unusual events, and affiant is informed and believes that it will consume at least thirty (30) days time to have the Clerk of the United States District Court prepare the whole of said record, and affiant avers that it would be an injustice to appellant, were said cause placed upon the Calendar in the October Term, and if appellant were required to prepare briefs or assignment of errors before the return of the said Charles Page, Esq., in October.

W. S. BURNETT.

Subscribed and sworn to before me, this 14th, day of July, 1909.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed July 14th, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Order [Filed Aug. 13, 1909] Extending Time to File Apostles.

Good cause appearing therefor, it is hereby ordered that California Navigation & Improvement Company, a corporation, petitioner and appellant herein, may have and it is hereby granted to and including the 3d day of September, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal in the above-entitled matter certified by the Clerk of the United States District Court, for the Northern District of California.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Aug. 13, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Apostles.]

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed five hundred and sixty-eight pages, numbered from 1 to 568, inclusive, with the accom-

panying exhibits, 5 in number, contain a full and true Transcript of the Record in the said District Court, in the cause entitled "In the matter of the Petition of California Navigation and Improvement Company, a corporation, Owner of the Steamer "Mary Garratt," for Limitation of Liability," No. 13,108, made up in pursuance of Rule 4, of Admiralty, of the United States Circuit Court of Appeals for the Ninth Circuit, and the instructions of Messrs. Page, McCutchen and Knight, proctors for petitioners and appellants.

I further certify that the cost of preparing and certifying to the foregoing Transcript of Appeal, is the sum of three hundred and thirty-seven and 80/100 dollars, ($337.80), and that the same has been paid to me by proctors for petitioner and appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 2d day of September, A. D. 1909, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal] JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1769. United States Circuit Court of Appeals for the Ninth Circuit. The California Navigation and Improvement Company (a Corporation), Petitioner, Appellant, vs. The Union Transportation Company (a Corporation), The Peter Musto Company and R. L. Scott, Claimants, Appellees. In the Matter of the Petition of the

California Navigation and Improvement Company (a Corporation), Owner of the Steamer "Mary Garratt," for Limitation of Liability. Apostles. Upon Appeal from the United States District Court for the Northern District of California.

Filed September 2, 1909.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

Certificate of Clerk, District Court, as to Exhibits.

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the annexed Exhibits, known as and numbered:

Filed by Commissioner Brown:

Petitioner's Exhibit No. 1 (Photograph).

Claimant's Exhibit No. 1 (Photograph).

Filed in open Court:

Petitioner's Exhibit No. 1 (Certificate of Inspection).

Petitioner's Exhibit No. 3 (Plan of Steering Gear of Str. "Mary Garratt").

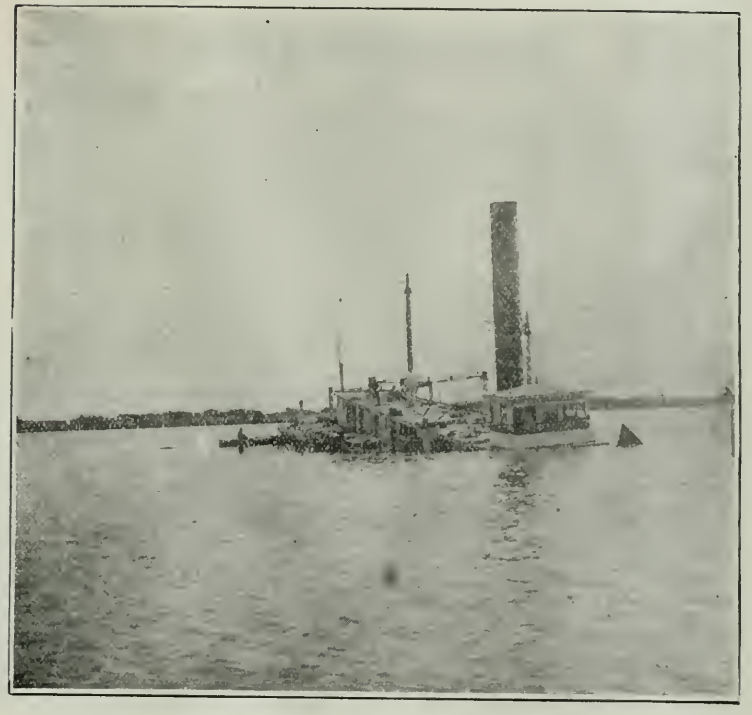
Claimant's Exhibit No. 1 (Chart of the Sacramento and San Joaquin Rivers).

—are original Exhibits introduced and filed in the Matter of the Petition of the California Navigation and Improvement Company, owner of the Steamer "Mary Garratt," for Limitation of Liability, No. 13,108, and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as per Stipulations filed in this Court and embodied in the Apostles on Appeal, herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 2d day of September, A. D. 1909.

[Seal] JAS. P. BROWN,
Clerk.

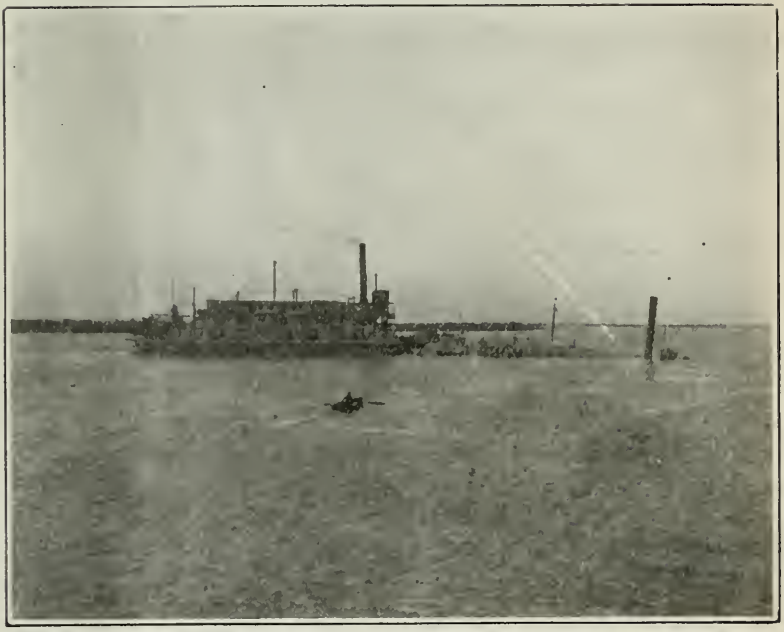
Petitioner's Exhibit No. 1.



[Endorsed]: Petitioner's Exhibit No. 1. 25812. Petitioner's Exhibit No. 1. Filed. Jas. P. Brown, United States Commissioner for the Northern District of California, San Francisco.

No. 1769. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit No. 1. Received Sep. 3, 1909. F. D. Monckton, Clerk.

Claimant's Exhibit No. 1.



[Endorsed]: Union Transportation Co. Claimant's Exhibit No. 1. 25812. Claimant's Exhibit No. 1. Filed. Jas. P. Brown, United States Commissioner for the Northern District of California, San Francisco.

No. 1769. U. S. Circuit Court of Appeals for the Ninth Circuit. Claimant's Exhibit No. 1. Received Sep. 3, 1909. F. D. Monckton, Clerk.

Exhibits

In Re

Petition of
Cal. Nav. Co. Owner
of Stmr. "Mary Garratt"
-for Limitation of
Liability.

#13108.

13108

In Re Petn Cal^a Navg^n & Impt Co } Claimants
" Stmr "Mary Garratt" } Union Transp^n Co
Limitation Liability — } Exhibit No 1

Jan 16-1909

J. T. Manly
Dep Clerk

No 1769
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
CLAIMANT'S EXHIBIT 'No. 1'
Received. SEP 3. 1909
F. D. MONCKTON, Clerk.

No. 1769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Petitioner,
Appellant,

vs.

THE UNION TRANSPORTATION COMPANY (a corporation), THE PETER MUSTO COMPANY and R. L. SCOTT, Claimants,
Appellees.

In the Matter of the Petition of THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Owner of the Steamer "MARY GARRETT", for Limitation of Liability.

APPELLANT'S BRIEF.

CHARLES PAGE,
EDWARD J. McCUTCHEN,
W. S. BURNETT,
Proctors for Appellant.

Filed this.....day of November, 1909.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 1769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Petitioner,

Appellant,

vs.

THE UNION TRANSPORTATION COMPANY (a corporation), THE PETER MUSTO COMPANY and R. L. SCOTT, Claimants,

Appellees.

In the Matter of the Petition of THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Owner of the Steamer "MARY GARRETT", for Limitation of Liability.

APPELLANT'S BRIEF.

Statement of the Case.

On Saturday, August 24, 1901, about 8 o'clock in the evening, the steamer "Mary Garrett", owned by The California Navigation & Improvement Company, a corporation (hereinafter called the California Company),

left Stockton, with a cargo of grain, bound for San Francisco. About 10 o'clock P. M. of that day, she collided with the steamer "Dauntless", owned by The Union Transportation Company, a corporation (hereinafter called the Union Company), at a point in the San Joaquin River, about ten miles above the town of Antioch. As a result of the collision, the "Mary Garrett" was uninjured, but a hole was stove in the hull of the "Dauntless" and she sank. She was subsequently raised, towed to Stockton and thereafter sold. Shortly after the collision, the Union Company commenced an action in the Superior Court of the City and County of San Francisco against certain stockholders of the California Company, seeking to recover the sum of $100,000 damages for alleged loss and damage sustained by the "Dauntless" by said collision, and in addition thereto, the Union Company filed its libel in the District Court of the United States, for the Northern District of California, against the California Company, seeking a recovery of damages for the same alleged wrong and in the same amount. On September 10, 1903, the California Company filed its petition for limitation of its liability arising out of said collision, to the value of the "Mary Garrett" and her freight pending, in pursuance of Sections 4283-4285 of the Revised Statutes, at the same time contesting its liability. On the same day the court made its order staying further prosecution of the two proceedings above mentioned, and directed an appraisement of the "Mary Garrett" and her freight pending. On December 22nd, 1903, the commissioner made his report, in which he found that the value of the

"Mary Garrett" and her freight pending was $33,150.58. On February 2, 1904, petitioner, the California Company, filed its stipulation in admiralty in the said amount of $33,150.58 with the Fidelity and Deposit Company of Maryland as surety, and on May 7, 1904, the commissioner reported that the following claims had been presented to him, namely:

Peter Musto Company, cargo lost on the "Dauntless",	$448.41
R. L. Scott, cargo lost on the "Dauntless",	$804.83
The Union Company, damages to the "Dauntless",	$100,000.00

Thereafter the three claimants filed their several answers; that of the Union Company on May 7, 1904; that of R. L. Scott and Peter Musto Company on June 17, 1904.

On June 16, 1904, the proceeding, upon the issues made by these several answers to the said petition of the California Company, came on for hearing before the court, and as a result thereof, on September 19, 1904, the court made its findings of fact and conclusions of law (Vol. I, 199), awarding to the petitioner the limitation it sought; holding the "Mary Garrett" solely responsible for the collision and referring the matter to a commissioner to ascertain and report the amount of damages for which the petitioner was liable.

Not until November 6, 1907, was the taking of testimony before Commissioner Manley begun (Vol. I, 213), and he appears to have heard the testimony that is found in Volume I of the Apostles, between the said

page 213 and the end of that volume, as well as the testimony contained in Volume II, from the beginning thereof, that is to say, page 241 to and including page 470. All this testimony appears to have been taken in November, 1907, and the testimony was not closed. Thereafter Commissioner Manley died and it was not until July 22nd, 1908, after an order had been made on the motion of proctor for the "Dauntless" (Vol. I, 209), on June 6, 1908, that the taking of testimony was resumed (Vol. II, 471), and it was concluded on that day. It is to be observed that while the total testimony taken on this reference covers 279 pages of the Apostles, only 22 pages thereof were taken before Commissioner Brown, who made the findings as to the amount of damage suffered by the claimants. This represented the testimony of just one witness out of a score examined. The balance of the 257 pages, or more than 92 per cent of the entire testimony, was taken before Commissioner Manley. We advert to this fact, inasmuch as by reason thereof, the findings of Commissioner Brown are not to be treated with that peculiar regard which is incident to conclusions reached upon a personal hearing and observation of the demeanor of witnesses. In a word, Commissioner Brown, in effect, based his findings upon depositions, and we therefore bespeak for the testimony that more critical examination, which when so taken, it always receives at the hands of the court.

Upon this hearing before Commissioner Brown, it was stipulated that the value of the merchandise lost by the claimants, R. L. Scott and the Peter Musto Company, as the same was set out in their respective answers—being

the amounts hereinbefore set forth, was correct and that these claimants had been damaged accordingly.

Commissioner Brown reported (Vol. I, 209-212) that the Union Company, through the injury to the "Dauntless", had been damaged in the sum of $35,834; Peter Musto Company in the sum of $448.41, and R. L. Scott in the sum of $804.83. This report was presented and filed in the court on September 5, 1908. These amounts did not include interest in any form, the commissioner reporting that the same had not been referred to him.

Thereafter, on September 10, 1908, the California Company filed exceptions to Commissioner Brown's report (Vol. II, 495) as to the damage found by him to have been suffered by the Union Company. These exceptions were overruled April 9, 1909 (Vol. II, 498), and the court awarded interest upon all the claims from the date of the commencement of the limitation proceeding; that is to say, from September 10, 1903.

Thereafter, on April 14, 1909, a final decree was made (Vol. II, 499), which recited the findings aforesaid as to the damage suffered by the several claimants; the giving on February 2, 1904, of the admiralty stipulation in the sum of $33,150.58, which, with interest thereon from September 10, 1903 (the date of the commencement of the limitation proceeding), up to the date of the decree (April 14, 1909), amounted to the sum of $44,277.92. The decree then distributes the fund last mentioned pro rata among the several claimants, that is to say:

To Union Transportation Company, the sum of $42,-735.65, with interest from the date of the decree;

To Peter Musto Company, the sum of $582.45, with interest from the date of the decree;

To R. L. Scott, the sum of $959.82, with interest from the date of the decree.

The California Company has appealed from the entire decree and urges upon this appeal:

1. That the court erred in holding the "Mary Garrett" at all responsible for the collision and that it at least should have held that the neglect of the "Dauntless" contributed thereto.

2. That the court erred in overruling the exceptions of the California Company to the report of Commissioner Brown finding the amount of damage suffered by the Union Company for injuries received by the "Dauntless" in the collision. The commissioner and court awarded such damages as for a total loss of the "Dauntless", whereas we contend, on behalf of the California Company, that there was no evidence before the commissioner to warrant the application of such rule, and that in any event, the sound value of the "Dauntless" just prior to the collision, as found by the commissioner and confirmed by the court, was an excessive valuation. Further, we contend that the damages suffered by the "Dauntless" were, in a large part, the result of the negligence of her owners in failing to care for her after she sank, and utter neglect after raising.

3. That the court erred in allowing interest upon the claim of the Union Transportation Company and in allowing interest upon the appraised value of the "Mary Garrett" and her freight pending.

Specification of Errors.

1.

That the court erred in overruling the exceptions of said petitioner and appellant to the report of Commissioner James P. Brown, filed herein September 5, 1908, and in overruling any of said exceptions.

2.

That the court erred in confirming the report of said commissioner, or any part thereof.

3.

That the court erred in finding that the claimant, Union Transportation Company, had or has suffered loss and damage or loss or damage, by reason of the collision of the "Dauntless" with the said "Mary Garrett" in the sum of $35,834, or in any other sum whatsoever, or at all.

4.

That the court erred in finding that the claimant, Union Transportation Company, had or has suffered loss and damage or loss or damage, by reason of the collision of the "Dauntless" with the said "Mary Garrett", in any sum of money in excess of $5,500, the cost of raising said "Mary Garrett", with interest from the date of the expenditure by said Union Transportation Company, of said sum.

5.

That the court erred in decreeing that said claimant, Union Transportation Company, was entitled to be paid interest on said sum of $35,834 from and after September 10th, 1903, or any interest whatsoever.

6.

That the court erred in decreeing that said claimant, Union Transportation Company, was entitled to be paid interest on the said sum of $35,834 from September 10, 1903 (the date of the commencement of this proceeding), or from any earlier date than the filing herein of the stipulation under Admiralty Rule 54, namely, January 23, 1904.

7.

That the court erred in awarding interest on the sum of $33,150.58, which last-mentioned sum constituted and was the amount of the stipulation in admiralty filed in pursuance of Admiralty Rule 54—said sum being the amount of the appraisement herein of said steamer "Mary Garrett" and her freight pending at the time of said collision.

8.

That the court erred in awarding any interest on the sum of $33,150.58, which last-mentioned sum constituted and was the amount of the stipulation in admiralty filed in pursuance of Admiralty Rule 54 (said sum being the amount of the appraisement herein of said steamer

"Mary Garrett" and her freight pending at the time of said collision) from an earlier date than the filing of said stipulation.

9.

That the court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said commissioner, and the said commissioner erred in that they failed to recognize or allow any credit for the loss and damage to the steamer "Dauntless", by reason of the carelessness and negligence of Union Transportation Company in attempting to raise said vessel.

10.

That the court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said commissioner, and the said commissioner erred in that they failed to deduct from the damage found to have been suffered by the "Dauntless", any amount or sum for damage or injury caused to said vessel last mentioned by the length of time she was permitted to remain beneath the waters.

11.

That the court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said commissioner, and the said commissioner erred in that they have not fixed or determined the amount or sum of money that would have been necessary or proper to expend in the restoration of the steamer "Dauntless" to her former condition and after said vessel was raised.

12.

That the court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said commissioner, and the said commissioner erred in that they have not determined or ascertained what it would have cost to have placed the steamer "Dauntless", after she was raised, in the same condition in which she was at the time that she sank.

13.

That the court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said commissioner, and the said commissioner erred in that while the value of the steamer "Dauntless", at the time she was sunk, has been found, nevertheless it has not been ascertained or found what it would have cost to have restored said steamer to the condition in which she was before she was sunk.

14.

That the court, in the said final decree and in its order overruling petitioner's exceptions to the said report of said commissioner, and the said commissioner erred in that the award of damages is excessive.

15.

That the court erred in holding (if it so held) that a total loss of the "Dauntless" had been admitted by the pleadings herein.

16.

That the court erred in finding (if it so found) that the "Dauntless" was a total loss.

17.

That the court erred in failing to find that the evidence did not show that the "Dauntless" was a total loss.

18.

That the court erred in failing to hold that the neglect, delay and negligence of Union Transportation Company, in permitting the "Dauntless" to remain sunken and unraised, barred the said Union Transportation Company of any right of recovery in this proceeding.

19.

That the court erred in finding that the neglect, delay and carelessness of Union Transportation Company, in protecting and salving the said "Dauntless" did not increase the damage sustained by the "Dauntless" by the said collision.

20.

That the court erred in failing to find that the neglect, delay and carelessness of Union Transportation Company, in protecting and salving the said "Dauntless", did not increase the damage sustained by the "Dauntless" by the said collision.

21.

That the court erred in failing to find that the cost of raising and restoring the "Dauntless" would have been less than her value after the restoration was made.

22.

That the court erred in awarding any damages in favor of Union Transportation Company by reason of loss or damage to the "Dauntless", inasmuch as there is no evidence in the record to show what it would have cost to have raised and restored the "Dauntless".

23.

That the court erred in applying the measure of damages it did, in the absence of a showing that the cost of raising and restoring the "Dauntless" would have exceeded her value after the restoration was effected.

24.

That the court erred in taking the original cost of the "Dauntless", her Texas deck and furnishings, less deterioration up to the time of the collision, as a basis for estimating her sound value just prior to the collision.

25.

That the court erred in failing to take the market value of the "Dauntless" just prior to the time of the collision as a basis for estimating her sound value at said time.

26.

That the court erred in failing to take into consideration the fact that Union Transportation Company did nothing, so far as this record shows, to ascertain the cost of raising and restoring the "Dauntless".

27.

That the court erred in finding that the proper cost of raising the "Dauntless" was $5,500 or any other sum in excess of $2,000.

28.

That the court erred in failing to find that the method of raising the "Dauntless" and bringing her to Stockton did not increase the damage which was suffered by her directly in the collision with the "Mary Garrett".

29.

That the court erred in failing to find that Union Transportation Company was so negligent and indifferent in the matter of the salving of the "Dauntless" as to disentitle the said company to recover any damages.

30.

That the court erred in finding that the original cost of the "Dauntless", without the Texas deck and furnishings, was $51,000, or any other sum, as there was no sufficient evidence before the court from which such or any original cost could be estimated.

31.

That the court erred in finding that the original cost of the Texas deck and furnishings subsequently added to said "Dauntless" was $15,000, or any other sum, as there was no sufficient evidence before the court from which such or any original cost could be established.

32.

That the court erred in finding that the "Dauntless", as originally built, with subsequent addition of the Texas deck and furnishings, cost $66,000 or any other sum, as there is no sufficient or competent evidence to prove said original cost.

33.

That the court erred in finding that the original cost of the "Dauntless", together with the Texas deck and furnishings, was in excess of the sum of $47,500.

34.

That the court erred in finding that the sound value of the "Dauntless" just prior to the collision, together with Texas deck and furnishings, exceeded the sum of $20,000.

35.

That the court erred in accepting exclusively hearsay testimony as to the original cost of the "Dauntless" and discarding ontnumbering witnesses, familiar with the value of steamboats, as to the value of the "Dauntless" just prior to the collision.

36.

That the court erred in finding that the "Dauntless" had depreciated only 33⅓ per cent or any other less percentage than 50 per cent.

37.

That the court erred in finding that the "Dauntless" had been well kept up.

38.

That the court erred in failing to find that the "Dauntless" had not been well kept up.

39.

That the court erred in deciding that the collision between the "Dauntless" and the "Mary Garrett" was not caused by any fault or negligence on the part of the officers or crew of the "Dauntless", but was caused by the negligence in the management and navigation of the "Mary Garrett" by her officers and crew.

40..

That the court erred in failing to find that the collision was wholly caused by negligence on the part of the officers and crew of the "Dauntless" in the management and navigation of said "Dauntless".

41.

That the court erred in failing to find that the collision was caused by the joint negligence of the officers and

crew of the "Dauntless" and of the officers and crew of the "Mary Garrett", and erred in failing to decree that the damages to the "Dauntless" and her cargo claimants be divided equally between petitioner and Union Transportation Company, the owner of the "Dauntless".

THE COURT ERRED IN HOLDING THE "MARY GARRETT" AT ALL RESPONSIBLE FOR THE COLLISION AND AT LEAST SHOULD HAVE HELD THAT THE NEGLECT OF THE "DAUNTLESS" CONTRIBUTED THERETO.

The report or argument of Eugene P. Rideout, who was in charge of the "Mary Garrett" at the time of the collision, furnished to the United States Local Inspectors of Hulls and Boilers, constituting "Petitioner's Exhibit 2", to be found in the record, Vol. I, page 196, must, for the time being, suffice as our argument. We submit it will be found in accord with the evidence in the record. We here reproduce its important features:

> "I would respectfully call your attention to the fact that the Str. 'Dauntless' violated Art. 25, Rule 9, by being on the left bank of the river, coming up, when she blew her first whistle. * * *
>
> "In the case of the collision of the Strs. 'Mary Garrett' and 'Dauntless' on the night of Aug. 24th, 1901, after one whistle was given and answered, then came, the risk of collision: See Rule IX, Art. 19. The 'Dauntless' being on the starboard side of the 'Mary Garrett'. I, Eugene P. Rideout, as pilot on watch on the 'Mary Garrett', endeavored to keep out of the way by trying to stop my headway, by backing my engines at full speed, according to Art. 21 of Rule IX.

"If the 'Dauntless' had kept her course and speed (which she should have done), there would have been no collision, as she would have passed the 'Garrett' on the port side. This was acknowledged by Capt. Dye, pilot of the 'Dauntless', and proven by the fact that the 'Dauntless' was struck on the port side back of her boilers after working her engines full speed astern.

"If I had blown an alarm whistle and endeavored to pass the 'Dauntless' on the starboard side, I would have violated Art. 22, Rule IX, which was in force while following the instructions of Art. 19, Rule IX. In not blowing the alarm whistle I followed the instructions of Art. 27, Rule IX."

EXCEPTIONS OF APPELLANT TO THE REPORT OF THE COMMISSIONER AS TO THE DAMAGES SUFFERED BY APPELLEE UNION COMPANY, BY REASON OF INJURY TO THE "DAUNTLESS", SHOULD HAVE BEEN SUSTAINED.

The commissioner's report will be found at Vol. I, p. 209 of the Apostles. The commissioner found, reciting the basis therefor, that the sound value of the "Dauntless" and her furnishings prior to the collision, was $39,834; that the cost of raising her was $5,500; and that her value, as she lay in the harbor of Stockton, after having been raised, was the figure for which the Union Company sold her, namely, $9,500. Deducting the cost of raising her, namely, $5,500, from her said value after raising, made her net value after the collision $4,000. This sum, in turn, the commissioner deducted from her value as found just prior to the collision, namely, $39,834, thereby finding that the Union Company had suffered damage, by reason of the collision, in the sum of $35,834.

Appellant contended that the owners of the "Dauntless" were indifferent and careless in the matter of protecting and salving the vessel, and that through the latter's fault the greatest damage resulted. As to this, the commissioner said: "The evidence does not in my judg-" ment, disclose *carelessness of a degree* to warrant such " a finding against the owners."

The court affirmed the commissioner's report but without making any findings of fact in relation thereto or writing any other than a memorandum opinion (Vol. II, 498).

We propose to discuss the following propositions in the order here outlined:

1. That the commissioner's estimate is based on a rule which is inapplicable to the case at bar.

2. That appellee Union Company failed to prove the cost of repair or even an estimate of such cost.

3. It appears that the damage to the ship was largely aggravated by the owners' neglect in raising and utter neglect after raising.

4. And (if the fact be material, in view of point 1) that the commissioner overestimated the sound value of the "Dauntless" just prior to the collision and committed error in failing to find that the sale of the vessel at Stockton was a sacrifice to the first comer.

5. That the only damage proved is the cost of raising the "Dauntless" and that this cost, as proved, shows an unnecessary outlay.

THE MEASURE OF DAMAGES WHERE A VESSEL IS SUNK IN COLLISION AND THE MODE OF PROVING IT.

It will be observed that the commissioner's report as to the damage suffered by the "Dauntless" is based upon the theory of her total loss. Before proceeding to consider the evidence and the authorities applicable, it is well that we should dispose of the contention made by counsel for the "Dauntless" to the effect that the appellant's pleadings had admitted the loss to be of this character. The petition for limitation or libel alleged the occurring of a collision between the "Mary Garrett" and "Dauntless", wherein the latter vessel was *damaged.* The answer of Union Transportation Co. (owner of the "Dauntless") admitted the allegation of damage and, in another part of the answer (Art. V), alleged a total loss of that vessel. The court found the "Mary Garrett" in fault and in view of the fact that the ship had been raised by her owner, also found that the "Dauntless" had been *damaged,* and it accordingly referred the matter to the commissioner to ascertain and report the damages. It was argued by counsel for appellee that the allegation of the *answer* filed on behalf of the "Dauntless" that the loss was total was nowhere denied by the petitioner and, claiming to rely on the case of *"The Falcon",* 19 Wall. 75 (an ordinary libel for collision), this omission to deny, it was argued, was an admission of total loss. A sufficient reply to this position is that

a. The petition or libel for limitation alleged *damage* to the "Dauntless";

b. The answer admitted the fact of damage and, in a separate paragraph, averred a total loss. The averment of total loss was "new matter" which could not be met except by a new pleading, if permissible. But Rule 51 (Admiralty Rules Supreme Court) expressly forbids the allowance of a replication and provides that "new matter" in an answer "shall be considered as denied by " the libelant", but by amendment to the libel, the libelant "may confess or avoid, or explain or add to the new " matter". It is clear, therefore, that the commissioner and court erred in this respect, if they accepted counsel's argument as sound. In *The Falcon* the court said that the answer "substantially admitted" the total loss set forth in the libel, *a very different proposition* from that here asserted, and it, therefore, applied a measure of damage different from that sanctioned by *The Baltimore,* 8 Wall. 377 (19 L. Ed. 463), in which the rule of repair was declared to be the right rule and in which (as *The Falcon* says) the answer expressly denied the total loss. Under the rule, therefore, there was a denial by the libelant in the case at bar of a total loss and the finding of the court itself so read the pleadings, because it was to the effect that "The Dauntless" had been *damaged.* Thus cleared, the field of discussion is narrowed down to the inquiry, what is the rule of compensation where damage has been done by a collision?

It is *restitutio in integrum;* the injured party is to be made whole. *He* must show what his damage is. Loss caused or increased by his own neglect is *not* damage. We believe these three sentences state the law with ref-

erence to damages in the admiralty, as at the common law. We may be allowed to add another sentence as corollary; the injured party cannot appeal for a new rule of damages because he has failed by his own neglect to prove a good enough case under the rule properly applicable.

IN THIS CASE THE RULE OF REPAIR WAS THE ONE APPLICABLE.

In *The Reno,* 134 F. 555, 556, the Circuit Court of Appeals, for the Second Circuit, thus states the rule:

> "The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, to which interest may be added to afford complete indemnity; and to this may also be added the necessary expenses of raising her, when that is necessary to determine whether she can be repaired advantageously; and when she is sunk in a place where she is liable to be an obstruction to navigation, the expenses of removing her may also be added. If she was not a total loss, then the measure of damages is the reasonable expense of raising and repairing her to an extent sufficient to put her in as good condition as she was before the collision. *The burden is upon the owner to prove the amount of his loss,* either by showing the vessel to have been a total loss, actually or constructively, or by showing the extent and cost of the necessary repairs and the incidental expenses. The Baltimore, 8 Wall. 377, 19 L. Ed. 463; The America, 11 Blatchf. 485, Fed. Cas. No. 285; The Havilah, 50 Fed. 331, 1 C. C. A. 519."

It need hardly be added that the court's reference to a constructive total loss is not to be understood as that term is used in insurance law.

Clark v. Fashion, 2 Wall. Jr. 339; Fed. Cas. 2,851.

The owner of the damaged vessel must prove either a physical and actual total loss, or the fact that it would have cost a sum to raise and restore the vessel in excess of her value just prior to the collision—that is the constructive total loss referred to. If he do neither of these things, then he must prove his damage by showing the extent and cost of the necessary repairs and the incidental expenses.

It was held in the leading case, *The Catherine v. Dickinson,* 17 How. 170 (15 L. Ed. 233), that the right to recover for a total loss must be established

> "by witnesses whose observations and experience enabled them to express opinions of *the feasibility of raising the vessel, and the probable expense of the same, and also of the expense of the necessary repairs*".

Not a witness has been produced by the shipowner to prove these facts. It does not appear that anybody examined the ship to ascertain the cost of repair except one man who says he made a rough estimate of the cost of repairs to the hull, which estimate he could not recall. But he admits having told somebody it was about $8,000 (Grant, Vol. 2, 465-467).

This was not a fulfilment of the requirement of the law. Such evidence proves only the feasibility of repair for some comparatively small sum.

It is not a case of total loss "unless", as the court again said in *The Baltimore,* 8 Wall. 377 (19 L. Ed. 463),

> "*it appears* that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her *would exceed or equal her value after the repairs were made*".

Justice Grier, at circuit, made a similar ruling which is quoted in appellant's brief, as printed in *The Baltimore* case.

In *The Falcon* (ubi sup) the Supreme Court, considering the application of the rule from the opposite side, so to speak, i. e., *the right* of the shipowner to raise his vessel under all circumstances, denied it in the case where such action would be more burdensome on the offending party than an abandonment of the ship altogether, and citing the case of *The Eugenie,* 1 Lush. 139, the court said:

> "The cost of the repairs exceeded the original value of the vessel *and this might have been ascertained before the repairs were commenced.*"

The burthen was still on the shipowner to prove the lawfulness of his damages. He must show that what he did was right, *or in the opinion of competent persons, seemed to be right.*

In a case of a sunken vessel raised and found to be of no value, Judge Benedict allowed the expense because it was the only means of determining whether or not the vessel could be repaired. He distinguished the case of a

vessel sunk in deep water where there was small chance of raising successfully.

The Nebraska, Fed. Cas. 10,076.

See also

The Thos. P. Way, 28 F. 526.

Where the duty to repair rather than abandon, is obvious, expense incurred in making preliminary survey to determine which course should be pursued, is not allowed as part of the damages.

The City of Chester, 34 F. 429.

The shipowner, in the case at bar, has shown nothing to warrant the assumption that the "Dauntless" could not be raised. Whitelaw, the wrecker, offered to do it for $5,000, "no cure, no pay", delivering the boat at either Stockton or San Francisco (Vol. 2, 290). She lay in the river near Stockton and San Francisco, where the best of appliances might be had. It is well known to the court that mechanical contrivances and powers at this day are infinitely superior to those of the time at which most of the decisions quoted were made. *The steamer was actually raised* at a cost of $5,500 (and much money was expended in bungling efforts), and it is quite certain that she could have been repaired. Her hull was in such good general condition that a freight carrier was made of her, simply because her new owner wanted a freight, and not a passenger boat. A freight boat necessarily is a strongly built and powerful steamer. The machinery of the "Dauntless" was in good order (Rideout, Vol. 1, 220) and there was no injury to the hull, except where she was struck. She was not even hogged when de-

livered at Stockton (Tucker, Vol. 2, 473-489). The former of these witnesses was the purchaser, the latter the wrecker employed by the shipowner and called by him to testify. If there was subsequent damage, it was due to the neglect of the ship for a year or more after raising. The purchaser said the boat was badly hogged when he got her (Vol. 1, 221).

Judge Lowell, in *The Cambridge,* 2 Low. 26; Fed. Cases 2334, interpreting *The Catherine v. Dickinson* and *The Baltimore,* holds that "the law must be" that when the circumstances are such that a "prudent, uninsured "and unindemnified owner" would sell the sunken vessel, such sale is at the risk of the wrongdoer; not otherwise. This, clearly, was not the condition of the ship.

The testimony of Mrs. Gillis is to the effect that Gillis "offered the navigation line the wreck *to repair, to put* "*in place as it was destroyed,* or to pay him for the "wreck" (Mrs. Gillis, Vol. 2, 374). The vessel, then, could have been repaired. If, then, it was the duty *prima facie* of the owner of the "Dauntless" to repair and the escape from this duty depended on proof by him that the cost of raising and repair would exceed the value of the ship when repaired, it is clear that he has utterly failed to maintain his right to recover for a total loss.

THE OBLIGATION TO RAISE AND REPAIR IS ESTABLISHED BY THE HIGHEST AUTHORITY.

The Catherine v. Dickinson, 17 How. 170; 15 L. Ed. 233.

In the case cited, the vessel was sunk on the Jersey coast. A few days later she was sold. Afterwards, she was sold and repaired. Damages were allowed by the lower court on the basis of the difference in the value of the vessel as she lay "sunken and disabled" and her value before the collision. The Supreme Court denied the application of the rule enforced by the court to a case where the vessel had been raised and after ruling that, in any case, the burthen was on the party claiming a total loss, to show *by the evidence of competent experts,* the facts concerning the feasibility and expense of raising the injured ship, held as to the case before it:

> "there is no necessity of resorting even to the opinions and estimates of experts as to the probable expenses, for as to these reasonable expenses incurred in raising and repairing her are matters of fact that may be ascertained from the parties concerned in the work. The libellant, instead of examination of witnesses as to their opinion of the amount of damage from an inspection of the vessel as she lay upon the beach, should have inquired into the actual cost of raising and repairing her, so as to have made her equal to the value before the collision."

The Baltimore, 8 Wall. 377; 19 L. Ed. 463, is to the same effect. This case recognizes that there may be cases which may be treated as total losses,

> "but it is clear that the court cannot award damages for a total loss, where it appears probable that the

> vessel and cargo may be raised without much expense and restored to their owners'',

(referring to *The Columbus* and *The Eugenie,* English cases relied on by the owner of the ''Dauntless'' here).

In *The America,* 11 Bltchfd. 485; Fed. Cas. No. 285, Judge Woodruff charged to the offending ship the cost of raising, though (as it turned out) useless because, if the owners had not done so, ''the objection that they '' should have raised her, *or proved that she could not* '' *be raised and repaired* would have been *effectually* '' urged by the claimants''.

Proof of inability to raise and repair is, therefore, a condition precedent to a recovery for a total loss and failure to produce such proof is an *effectual* defense against recovery of such value.

In the *Mary Eveline,* 14 Blfd. 497; Fed. Cases 9212, Justice Hunt cited *The America* saying:

> ''There is in many cases, no other mode in which it can be determined whether the loss is total or partial.''

See

The Nebraska, Fed. Cas. 10,076.

The Court of Appeals (New York Circuit) said in *The Havilah,* 50 F. R. 331:

> ''It is no doubt true that the mere fact of sinking is not sufficient to warrant a finding that vessel or cargo is a total loss and where it appears probable that they may be raised without much expense and the vessel repaired, owners are not allowed to insist upon damages as for a total loss, where they have not employed reasonable measures to mitigate the loss.''

The court, referring to *The Falcon,* 19 Wall., and other cases, holds, however, that the owner must not act without regard to facts and undertake, at the wrong-doer's expense, to raise vessels from difficult places without regard to cost, merely because of this right which the law ordinarily gives him.

See

The Reno, 134 F. 555.

Take, now, the situation of the "Dauntless", as presented by the evidence. She was worth to her owner, as sworn in the original libel, again in the claim and again in the answer $100,000; at least, this was the damage alleged to have been suffered from her loss. The evidence, if there was any, introduced to show the right to a claim for total loss was such as is described by the Supreme Court in *The Catharine v. Dickinson,*

> "loose, general opinion of the subject, * * * entitled to a very little more respect in the ascertainment of facts than the conjecture of witnesses."

The vessel was in fact raised. There is no evidence that she could not have been repaired. Excepting to show that she was sold in about a year for $9,500 and transformed into a freight carrier at a cost of $16,000, no evidence regarding the cost of repair was produced by the shipowner. He did not show, or try to show that the cost of restoring the "Dauntless", as a passenger boat, added to the cost of raising, would have exceeded her value when restored. This is not even pretended, as we understand the evidence. Yet such evidence is the

only justification for se'ling the ship, virtually in her dismantled state, after a year of neglect, to the first comer. Said Rideout (Vol. 1, 214):

> "I needed a boat and communicated with Mr. Gillis and we bargained about the price of her.
>
> "It was in the neighborhood of a year after she sank."

(Vol. 1, 219) and after she was raised.

Justice Grier said:

> "This is not the first instance in which I have had to notice that where one vessel has been so unfortunate as to come into collision with another, the parties injured suppose that the insurance doctrine of abandonment will apply to their case, and they may therefore increase the damages *by their own neglect.* The only measure of damages is the amount it would cost to repair the damages."

Quoted at p. 463, 19 L. Ed.:

> "If the party suffering the injury to his property will not employ any reasonable measures to stop the progress of the damage, but wilfully and obstinately, or through gross negligence, suffers the damage to augment, it is his own folly and the law will not afford him any redress for such part of the damage as proceeded directly from his own culpable default."
>
> *The Baltimore,* 19 L. Ed. 466.

See *Sam Gaty,* 5 Biss. 191, Fed. Cas. 12,276, in which Judge Blodgett, following *The Baltimore* and citing Judge Grier's unreported decision, says in a case where repairs should have been, but were not made or estimated and where total loss by sinking was claimed:

> "there is no evidence before me tending to show what is the amount of damages proper to allow the libellant. Under such circumstances, the court can do one of two things, either allow the libellant but nominal damages, because he has not proved the amount of his damages, or to make a conjecture and find, merely on the court's knowledge of such matters, as to what ought to be allowed the libellant."

See, also, *Pa. R. R. v. Washburn,* 50 F. R. 336.

In the case at bar, the evidence shows, as it did in *The Thomas P. Way,* 28 F. R. 526, that the owner's "neglect to raise the boat was intentional and was de- "signed to compel the respondents to pay for a total "loss, when the injury and the circumstances of the "sunken boat, were not such as legally bound them to "do so."

Will the court say that the neglect of this valuable steamer for one year did not largely contribute to the depreciated value paid for her by Rideout?

Will it say that the offer of the first comer for her injured and neglected hull was the best value which the owner might have obtained for her?

Will it say that the refusal to accept the service of Whitelaw and the butchering method of dragging the ship to Stockton did not seriously aggravate the injury?

Will the court not see the intent to sell (if possible for $100,000) to the offending ship?

There was some slight evidence as to the cost of repair sought to be produced not by the injured, but by the offending shipowner. The witness Grant (Vol. 2, 464)

was a shipwright and made some sort of a bid, $8,000 perhaps, for repair of the ship's woodwork. This may not have included the furnishings which the commissioner valued at $2,000 in his report. But in any case, it was the duty of the owner of the "Dauntless" to repair or ascertain the cost of repair. Presumably, this was done and presumably the evidence was within his reach. He must bear the loss if he did not choose to produce it.

The J. B. Thomas, 81 Fed. R. 578, 583;
Missouri, etc., Ry. v. Elliot, 102 F. R. 96, 102.

It is absurd to think that the owner of a vessel submerged in a river near Stockton or San Francisco liable to suffer, as he swears, $100,000 worth of damage, *did nothing* to save himself. If he did anything, the failure to show what he did do, implies in law that its discovery now would be less advantageous to him than the recovery for a total loss.

1 Moore on Facts, Sec. 563.

The owner of the "Dauntless" relies on *The Falcon,* 19 Wall. 75, 22 L. ed. 98, and on the cases there cited, *The Eugenie,* 1 Lush. R. and *The Columbus,* 3 Wm. Rob. 161.

The Falcon was decided on the fact that a total loss had been "substantially admitted" in the lower court and by the pleadings. "No point to the contrary was "raised or suggested." Proof of raising and repair was first presented after the appeal. The court said:

> "At whose instance and *at what cost this was done* and by what right those in possession claimed

> to hold her, are not shown; nor is it alleged or shown that she was ever tendered back to the appellants."

She was sunk in the Chesapeake Bay. "It is clear " from the proofs that she could not have been raised " and repaired without the expenditure of a large sum " of money."

The inapplicability of this case is evident in view of the fact that, at a small proportional cost, the owner of the "Dauntless" did raise her.

The Eugenie, as we have shown, simply decided that the injured shipowner has no right to increase the damages suffered by him by attempting to raise and repair a vessel at an expense which it "might have been ascertained before the repairs were commenced" would exceed her value when repaired.

The Columbus is the case of a *fishing smack sunk at sea.* The court held that there was no duty on the owner's part to spend money in trying to raise her. It said

> "it was a matter of considerable difficulty to define under what circumstances a vessel can be abandoned by the owner in case of a collision."

The sinking *at sea* is the essential condition of the right to abandon, for the court adds regarding a case " where the vessel is not actually sunk but is only par- " tially damaged":

> "In the latter case, where there is the *slightest* chance of bringing the damaged vessel safely into port, the principle, undoubtedly, would not apply."

See the two photographs (Vol. 1, 529, 530).

It is clear that this rule would not apply to a valuable steamer lying on soft bed of a river, partly above water, and easily raised.

THE COMMISSIONER'S ESTIMATE OF VALUE (ASSUMING THERE HAD BEEN A TOTAL LOSS) WAS ERRONEOUS BECAUSE HE TOOK COST, LESS DETERIORATION, AS HIS BASIS. HE SHOULD HAVE ASCERTAINED THE MARKET VALUE. AND HE ALSO ERRED IN ACCEPTING HEARSAY, AND EXCLUSIVELY HEARSAY TESTIMONY AS TO THE ORIGINAL COST AND DISCARDING OUTNUMBERING WITNESSES, FAMILIAR WITH STEAMBOATS, AS TO THE VALUE AT THE DATE OF THE COLLISION.

THE COMMISSIONER SHOULD HAVE ASCERTAINED THE MARKET VALUE.

Dr. Lushington said:

> "The length of time during which a vessel has been used and the degree of deterioration suffered will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most unlearned—the constant change which takes place in the market. It is the market price which the court looks to, *and nothing else,* as the value of the property."
>
> *The Clyde,* Swabey 23.

THE COMMISSIONER ERRED IN ACCEPTING EXCLUSIVELY HEARSAY TESTIMONY AS TO THE ORIGINAL COST AND DISCARDING OUTNUMBERING WITNESSES, FAMILIAR WITH STEAMBOATS, AS TO THE VALUE AT THE DATE OF THE COLLISION.

Capt. Goodall placed the vessel's value at $50,000 (Apos. Vol. 1, 222). He admitted this was based on the fact that *Gillis, the President of Union Co. had once told him* she cost $51,000 (Vol. 1, 224). The furnishings *and* the Texas deck Capt. Goodall claimed cost *$13,000* additional (Vol. 1, 222). This was the supposed cost nine and a half years before the collision (Vol. 1, 223).

Anderson, manager of a steamboat company, placed on the "Dauntless" a value of $50,000, admitting that he knew nothing of her condition (Anderson, Vol. 2, 257). He based his opinion on the "Weber's" value, a sister vessel, which he knew; yet he had to confess that four years after the collision, his company bought the "Weber", the "Columbia" (a larger vessel) and the good will of a steamship business, all for $50,000, and he further admitted that in 1904 (the date of the purchase) steamboat property was more valuable by reason of the increased cost of building, than in 1901, the date of the collision; at least 10 per cent, perhaps twenty per cent (Anderson, Vol. 2, 249, 250, 254, 255, 256, 265).

Mrs. Gillis, wife of the president of the company owning the "Dauntless", said the ship cost $65,000 (Vol. 2, 274, 275). This she knew "from asking questions" (Vol. 2, 278, 280). Maroncci built the hull and Fulton Iron Works the machinery (Vol. 2, 283). These people

were not called. They could presumably tell the cost. Finally, Mrs. Gillis admitted that she was *not prepared* to say that the payments to the builders of $51,000 did not include the furnishings ($15,000) (Vol. 2, 284, 285). The Texas deck might have added $3,000 to the cost.

On such evidence, the commissioner based his value of the ship, saying that she cost originally and therefore was worth at the time of collision $66,000 less deterioration. The evidence showed that such vessels in their hulls deteriorate in value at the rate of five to six per cent (Cameron, Vol. 2, 253-4, a witness for the "Dauntless"). Leale, acknowledged in his report by the commissioner as an expert as to deterioration, and Grant, shipbuilder, testified that, without overhauling, a steamer would fall away 50 per cent in ten years and that the "Dauntless" was worth only $25,000 (Vol. 2, 432, 444).

Yet the commissioner rejected the testimony of these witnesses and allowed for deterioration three per cent per annum as to hulls, when so far as we can see, nobody testified to this rate.

The Clyde, Swabey 26 (Dr. Lushington) is very instructive. As against the affidavit of the owner regarding original cost, unsupported by documentary evidence, and witnesses regarding value who had seen the ship but who based their opinions, *as here,* "on the supposition of " the original cost of the vessel as stated to them by " him" (owner), that learned judge preferred the opinions of witnesses who had never seen the vessel but who were competent generally to express an opinion. On our side,

Brooks, a builder, testified that Gillis, the owner of the "Dauntless" had told him that the two boats, "Dauntless" and "Weber", *together,* had cost $95,000. This was legitimate evidence, because an admission. *Little had been done for years on the boats.* At the time of collision, the "Dauntless" was worth $25,000 (Vol. 2, 393-395).

The witnesses Don (Vol. 2, 332), Strother (Vol. 2, 351), Potvin (Vol. 2, 355), Robinson (Vol. 2, 381) all testified to the same fact. Mr. Clark had an undoubted ability to value the "Dauntless" and placed on her the value of $20,000, not to exceed $25,000 (Vol. 2, 403), Burns (Vol. 2, 409) to the same effect; also Leale (Vol. 2, 432), Grant (Vol. 2, 444). The last named witness had heard that the original cost of the vessel was $45,000 to $50,000 (Vol. 2, 445). He did not know anything about the furnishings. The evidence of this witness was not friendly to the petitioner. He was evasive. He had worked for the other side; had made an estimate of the cost of repair; would not or could not remember what it was, though he had handed the figures to Mr. Frank, proctor for the Union Co., who reported them burned. Obtaining this estimate was the only step taken by the owner of the "Dauntless" looking towards repair of the damage. He neither admitted nor denied that the estimate was $8,000. A witness was asked (Clark, Vol. 2, 469) what Grant had said to him a few days before as to what he (Grant) had said to Gillis (owner of the "Dauntless") regarding what he would charge to repair that vessel after the collision (Vol. 2, 469).

The commissioner sustained an objection by the proctor for the Union Co. thus excluding from the evidence the only fact other than admission of Gillis to Brooks tending to prove the real damage to the "Dauntless".

On the side of the petitioner, at least nine witnesses testified from their general information as captains and pilots and managers regarding such vessels and of the market for such vessels, that the "Dauntless' was worth from $20,000 to $25,000. The commissioner preferred to strike out the matter of market value in 1901 and to take the "hearsay" cost of 1892, allowing 33⅓ per cent deterioration.

THE OWNER OF THE "DAUNTLESS" INCREASED THE DAMAGE BY ITS FAILURE TO ACT PRUDENTLY AND QUICKLY, OR TO SEEK THE BEST PRICE FOR THE VESSEL ON HER SALE.

The accident happened Saturday evening, August 24, 1901; the photograph, Claimant's Exhibit I (Vol. 2, 530) was taken the following Monday morning (Vol. 2, 421). The photograph offered by petitioner (Vol. 2, 529), shows the "Dauntless" in substantially the same position (Vol. 2, 426). As will be noticed, the vessel was not totally submerged. She appears to have been on a mudbank. Every time the tide changed, which was twice a day, she would swing a little and keep working down. Finally, in two or three days, she slid off the mudbank into deeper water (Vol. 2, 425). The witness who testified to this (Beringer) was first mate of the "Dauntless" and he stayed aboard her until her sister ship, owned by

the same company, the "Weber", came down from Stockton Sunday night or Monday morning (Vol. 2, 422). No effort was made to keep the "Dauntless" on the mud-bank and prevent her from being carried by the current and tide into deeper water. There is some conflict as to the methods by which this should have been accomplished —but there can be no doubt it could have been done. Finally, when the wrecking operations began, she was about a mile—one witness said a mile and a half—from her original position, and completely submerged but for her masts (Potvin, Vol. 2, 254; Robinson, Vol. 2, 262). Of course, it was easier to raise the "Dauntless" from the position shown in the photograph than it was out of 50 feet of water (Grant, Vol. 2, 448). This thought has a bearing on the expense incurred in effecting the raising of the vessel. As we have seen, all that her owners offerred in the way of evidence was the statement that the cost was $5,500. The owners should have shown what proportion of this was expended by reason of the greater exertions made necessary by the further submersion of the vessel.

Whitelaw, recognized as one who understands the business of wrecking and raising vessels (Vol. 2, 483) and who has got the only good wrecking plant on the coast (Vol. 2, 289), testified that within two days after the accident he was called on by Gillis, who asked what he would charge for raising the "Dauntless". After sending a man to investigate the conditions, he answered $5,000, no cure, no pay. The offer was rejected (Vol. 2, 290-1). Gillis thought the price too high, saying the

work would take only a few days (Vol. 2, 297). She should have been raised without injury in August in 10 to 15 days (Vol. 2, 291); 20 days at an outside figure allowing for all possible delays and accidents (Vol. 2, 303).

Don, a disinterested witness, met Gillis, the President of the Union Co., the day after the collision. The latter's answer to the inquiry whether he was going to raise the ship, was a shrug of the shoulders and the remark: "I am not going to do anything with her. I am going "to let her be and let the Company pay for it" (Vol. 2, 315-6).

Two weeks or ten days later, he was working on the ship. When an effort to pull the "Dauntless" with two steamers failed, Gillis said, "We will quit right now and "go to Stockton and let her be" (Vol. 2, 318). This witness said the contractor Delany, who had charge of the operation for two weeks, did not work the right way. He had no timbers or anything to raise her (Vol. 2, 328). The witness worked once for 20 days, then 28 days (Vol. 2, 327-29).

Instead of raising the vessel in a few days, the work took four months. Gillis superintended (Vol. 2, 286) and interfered with the work (Robinson, Vol. 2, 363-4) unbuckling the hog chains (Vol. 2, 369).

Robinson asked Gillis why he did not get to work sooner. The answer was "it was not up to him, but the Navigation Co." (Vol. 2, 372). "My boy", Gillis said, "when the 'Mary Garrett' touched the 'Dauntless,' she "belonged to the Navigation Co." (Vol. 2, 373).

Again, when the question was whether the "Dauntless" should be towed by a steamer of the same company or one of the California Navigation Company, Gillis said it would look better to have Navigation Co. tow her up. The "Dauntless" would look like their boat. He would go to the office and get his money. "I will " tell them there is their boat" (Vol. 2, 374, 375).

Beringer, mate of the "Dauntless", testified Gillis told him he would take everything he could off the "Dauntless" and the Navigation Co. would take care of the boat; he would turn her over to them. This was before the "Dauntless" slid off the bank (Vol. 2, 415-417).

Mrs. Gillis testified to the fact that she knew from the president of the appellant that Gillis offered the wreck to it to repair or to pay him for the wreck (Vol. 2, 274).

There is no contradiction of these facts. Gillis himself was not a wrecker; Roach was never called; Don was a mariner, Delany was not called, Tucker was a diver but not a wrecker. The latter, who worked on her after Roach and Delany's failure, said that the way the work was being done when he took hold, nothing could be done. The contractor was using condemned seven-eighths chains which would part (Tucker, Vol. 2, 484-5).

It appearing from the evidence of the owners' own witness that the work done in the raising operations was futile until he undertook it, it is proper to direct the court's attention to the fact that Tucker did not assume charge until November 30, 1901—at earliest. He testifies that he was to have gone to the scene of the wreck from San

Francisco the day the "San Rafael" was sunk, which was November 30, 1901 (Vol. 2, 480). He testified that it might have been three months after August 24th. When he went up to the wreck, which he did for the first time, that is to say on or subsequent to Nov. 30th, Delany was doing his ineffectual work (Vol. 2, 480). It seems that Tucker was working on the wreck for five or six weeks (Vol. 2, 471). From this it will be observed that from the cost of $5,500, of raising the "Dauntless", there should be deducted therefrom the amount, whatever it was,. expended before Delany was discharged. When we recall that Whitelaw undertook to do the work for $5,000—no cure, no pay—the excessiveness of the expenditure of $5,500 is strongly suggested. If Whitelaw was taking the risks of freshets and other hazards (none of which appear from the evidence to have been in fact encountered) and yet could offer to raise the boat for $5,000, it would seem that $2,500 or $3,000 at the outside, would be a liberal allowance for the cost of raising her.

When the boat finally reached Stockton, she was patched with canvas over the hole, and left for more than a year. Then sold to the first comer, for a nominal sum, when it is remembered that according to the witnesses for the "Dauntless", Rideout and Tucker, she was all right, as to her machinery and hull, other than the mere hole. The houses are made of light material and cost but little.

In the absence of contradiction, it seems quite clear that Gillis wilfully abandoned his vessel to her fate.

In conclusion, on this branch of the case, we submit that Union Company utterly failed to prove that it had sustained damage in excess of the sum of $2,500 or $3,000 at the outside—the reasonable cost of raising the "Dauntless".

Apparently, realizing the soundness of appellant's contentions, after the course followed by appellee, Union Company, had satisfactorily resulted to said appellee in obtaining a very large judgment, this court has been petitioned by appellee for leave to take further testimony. This application, we understand, the court has denied for the time being without prejudice to its reconsideration by the court, should the court deem the taking of further testimony necessary. It will therefore be appropriate to say something here in reference to that proposed procedure.

AS TO THE APPLICATION OF APPELLEE UNION TRANSPORTATION COMPANY TO TAKE TESTIMONY.

In

The Sirius, 54 F. 188,

which was decided by this court February, 1893, shortly after the organization of this court, it is said:

> "We hold that new evidence, if material and competent, may be introduced upon the trial of an admiralty case in this court, if for any cause other than the fault of the party offering the same, such evidence cannot be introduced upon the original trial. But, without a showing of a sufficient reason for doing so, this court will not admit new evidence."

No doubt, this court intended this announcement to be a guide in the future to litigants and proctors in this matter of taking further testimony in the appellate court.

The same court in *Pacific Steam Whaling Co. v. Grismore,* 117 F. 68, 70, characterized this procedure as

> "a practice, which, by the way, is becoming entirely too common. Parties should endeavor to procure all the testimony material to the issues presented by the pleadings in the first instance. The practice of bolstering up a lost cause by additional testimony ought not to be encouraged."

In

The Saunders, 23 F. 303,

the Circuit Court for the Southern District of New York, in an appeal in an admiralty cause, speaking through Judge Wallace, said:

> "If parties are permitted to withhold evidence in the District Court, take the chance of success without it and then avail themselves of it by appeal in case of failure, the practice would tend to intolerable abuses. It would be unjust to the adverse party, because he might prefer to abandon his case if the testimony had been presented, rather than incur further expense and labor in litigating. It would be trifling with the court of original jurisdiction by invoking its decision upon a hypothetical case while withdrawing the real case from consideration. It would impose unnecessarily upon a court of appellate jurisdiction the duty which appropriately belongs to a court of original jurisdiction."

We submit the evidence in the case at bar so clearly required the owners of the "Dauntless" to prove the cost of her restoration, under the clear decisions of the

Supreme Court of the United States, that her owners are entirely without any standing to now ask that they be permitted to take this further testimony.

We do not understand that in admiralty the rule is different from that of any other court of law—a rule that is essential to the orderly administration of justice—which, put in a homely way, is that as a person makes his bed, so must he lie in it.

An illustration of this in the admiralty practice will be found in the case of

The Margaretha, 167 F. 794,

where it was held that where a party in the trial court chooses to submit the case upon the testimony of his opponent, without offering his own testimony, and he prevails upon the trial court to agree with him in his contention that upon such evidence he is entitled to prevail; upon the taking of a successful appeal by the defeated party, the appellate court will neither hear the testimony which the prevailing party in the trial court voluntarily abstained from offering; nor will it remit the cause for further hearing to the trial court.

In the case at bar, there was a most protracted hearing before the commissioner, after a long delay elapsing between the finding of the court holding the "Mary Garrett" solely responsible for the collision and referring the matter to a commissioner to ascertain and report the amount of damages for which the petitioner was liable. The court so found on September 14, 1904, but it was not until November 6th, 1907—more than three

years later—that the taking of testimony upon such reference was begun.

To have offered evidence as to cost of restoration at that time, would have extended but in a slight degree the long record which was piled up by appellee's endeavors to prove the measure of damages as based upon a total loss.

And should this court see fit, believing that the interests of justice require it, to permit the taking of this further testimony, then we suggest that it is well within the power and it would be but a proper exercise of the discretion of this court, upon such award as it may thereafter make, to withhold the allowance of interest thereon. The interval of three years above mentioned should be sufficient in itself to bring about this result; but if not, surely, if up to the present time appellee has failed utterly to establish any damages that the court can consider, an allowance of interest on the award that ultimately may be made would, under such circumstances, amount to an abuse of discretion.

In any event, if new testimony is to be taken, we submit that the costs of taking this appeal and the costs of the appellate court should, regardless of the ultimate result, be imposed upon appellee.

This was done in

Red River Line v. Cheatham, 60 F. 517,

where there was some, but not a clearly sufficient excuse, why the testimony was not taken in the lower court.

We recall counsel for appellee suggesting in support of his application to take further testimony, that had

the exceptions of appellant been sustained to the commissioner's report, the trial court would have again referred the matter to the commissioner. Now, we submit that is obviously no argument to support this application in the appellate court, but, assuming that the District Court would have so acted, it certainly would have imposed the cost of taking the further testimony to support the true rule of damages on the party who had failed to adduce such testimony, that is to say, the appellee. This was done by Judge Hanford in a precisely similar case,

The Ernest A. Hamill, 100 F. 509, 512.

INTEREST.

Appellee, Union Transportation Company, in its claim and answer, alleged the value of the "Dauntless" to be $100,000. The best showing they could make before the commissioner was that the original cost was $65,000 and at the time of the collision the vessel was some 9½ years old. If it is possible to assert a deliberately excessive claim that seems to have been done in the case at bar. In addition to this, as hereinabove pointed out, for more than three years, no action was taken by appellees to have the amount of their claims ascertained by the commissioner to whom the cause was referred. By reason of this delay, the commissioner, before whom practically all the testimony was taken, and who had the benefit of observing the demeanor of the witnesses, died; furthermore, in the meantime, evidence was lost and destroyed

by reason of the fire. Of course, evidence of the value of the "Dauntless" was something far more within reach and ascertainment of her owners than appellant. By reason of these features, we submit that a sound exercise of discretion would have resulted in the withholding of interest on the claims of appellees, and if this be true of the trial court, there is no reason why the appellate court should not do justice in the premises.

Merritt etc. Co. v. Morris etc. Co., 137 F. 780.

If, for any reason, the award of the District Court should stand, the necessity for the withholding of interest is the more obvious. If appellee Union Transportation Company is to be permitted to recover as for a total loss, under circumstances at least of grave doubt as to whether such a course be permissible, and is on this head thus recovering possibly more than it be entitled to, it is proper for the court to, and it should take this into consideration and withhold interest.

Compare

The Alaska, 44 F. 498.

In addition to what we have just said, as hereinabove pointed out, should this court decide to permit the taking of further testimony as requested by appellee Union Transportation Company, then the necessity of withholding of interest, if justice is to be done, is imperative.

Respectfully submitted.

CHARLES PAGE,
EDWARD J. MCCUTCHEN,
W. S. BURNETT,
Proctors for Appellant.

No. 1769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Petitioner,
Appellant,

vs.

THE UNION TRANSPORTATION COMPANY (a corporation), THE PETER MUSTO COMPANY and R. L. SCOTT, Claimants,
Appellees.

In the Matter of the Petition of THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Owner of the Steamer "MARY GARRETT", for Limitation of Liability.

Appellees' Brief.

NATHAN H. FRANK,
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CAMPBELL, METSON & CAMPBELL,
Of Counsel.

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Appellees' Brief.

I.

THE QUESTION OF LIABILITY FOR THE COLLISION.

This question is opened by appellant in a very unusual manner. He submits part of a letter written by pilot Rideout of the "Mary Garrett", addressed to the Board of Local Inspectors as a protest against the de-

cision already rendered by that board suspending his license. Aside from the fact that it has no probative effect, it is not in accord with the evidence in that regard, nor even in accord with his own report of the accident, filed with the commissioners before the investigation. (See Vol. 1, p. 198.) The manner in which the collision occurred is related by the same witness on Record, pp. 59, 60 & 61, and is as follows: When the "Dauntless" came around the bend at Kentucky Landing, marked K. on claimant's Exhibit No. 1, Vol. 2, p. 533, the "Garrett" was a mile or a mile and a half away in the neighborhood of Fishermen's Slough. The "Dauntless" straightened up on her course, which by the rule of the road, as well as by the necessities of her traffic, gave her the right to proceed along the right hand bank going up from K. along the island indicated by Bradford No. 7 and No. 8. Both vessels were then upon a straight course. The "Dauntless" gave her signal, one whistle, which was heard and answered by the "Garrett" with one whistle, indicating that they were to pass port to port. Rideout says he does not think they were over half a mile apart when the whistle was blown. The pilot, Sperry Dyer, of the "Dauntless", says the "Garrett" was ahead of him in the neighborhood of three-quarters of a mile. (p. 127.)

Rideout, pilot of the "Garrett" continues:

"Q. After you had answered him with a signal of one whistle, and were proceeding towards him, what, if anything, did your vessel do?

A. My vessel sheered to port.

Q. Sheered to port?

A. Yes, sir.
Q. What happened next?
A. I attempted to control the vessel, to put the rudder over to straighten her up. She didn't respond quickly, and when I saw that I could not pass the 'Dauntless' on the port side I rang the usual signals to reverse the engines and backed at full speed and blew three whistles."

At this time the "Dauntless" was, as admitted by Rideout, closer to the left bank than the right bank of the river. Dyer says that the "Dauntless" was right on the right bank going up. "We were up against the bank when he hit us", and the width of the river at that point is a thousand feet. (p. 128.)

This testimony is undisputed, and from it there can be but one conclusion as to which vessel was at fault. There is absolutely nothing pointing to any fault on the part of the "Dauntless". The finding of the lower court that the "Mary Garrett" was at fault is therefore, not only justified, but is also without a scintilla of evidence showing contributory negligence on the part of the "Dauntless".

II.

THE LIMITATION OF LIABILITY SHOULD HAVE BEEN DENIED, AND THE DECREE OF THE DISTRICT COURT SHOULD, IN THIS RESPECT, BE MODIFIED.

This question is still open to us on this appeal, not only because this is a trial de novo, but also because the appellant has on the appeal opened up the whole ques-

tion of liability. This decree may therefore be altered in our favor.

Gilchrist v. Chicago Ins. Co., 104 Fed 571;
Irvine v. The Hesper, 122 U. S. 256;
Munson SS. Line v. Miramar SS. Co., 167 Fed. 960;
Nelson v. White, 83 Fed. 216 (citing among others The Hesper);
Paauhan S. Plt. Co. v. Palapala, 127 Fed. 922.

The decree of limitation is only interlocutory.

Deslions v. La Compagnie, Etc., 210 U. S. 95.

That the court erred in granting the limitation, seems to us is clear. The foregoing testimony of the manner in which the accident occurred, leaves no doubt of the unseaworthiness of the "Mary Garrett" with respect to her steering gear. A vessel that cannot be navigated up and down the river in a manner that will enable her to pass another vessel in a thousand foot channel without sheering almost at right angles (Capt. Rideout's report p. 198, indicates that she struck the "Dauntless" at an angle of 90 degrees; Sperry Dyer says that from the time the "Garrett" began swinging till she struck him, he would judge that she had swung 3 or 4 points, p. 128), is not seaworthy for such navigation.

Rideout testified that *he attempted to control the sheer, but she would not respond quickly,* and he was unable to prevent the collision. He says, regarding a previous statement made by him to the effect that there would have been no collision if he could have handled

his boat as he intended to, and that it was an unexpected sheer she took that caused the collision: "I meant to " convey by that remark that it was an *unexpected* sheer " she took. *I lost control of the boat and could not " swing her so that I could pass on the port side."* (p. 65.) Again: "The steering gear was too quick, too " strong, that handled the rudders in spite of my control " —that is what I meant." (p. 66.)

There is further evidence of pilots, who had handled the vessel, that at times she would take control and swing clear around. This fact is undisputed, though there are different theories advanced to account for it. Whatever may be said of those theories, it remains an undisputed fact in this case that upon this particular occasion she did take control and run away from the pilot and thus cause the collision.

This condition was known to the managers of the California Navigation and Transportation Company.

J. W. Glenn, who was manager of the company at the time of the accident, says she was a quick acting boat, she would sheer one way or the other very quickly, and it required *a man who understood her,* and was steady, not to give her too much wheel, that is, not move the rudder too far one way or the other, because *she would go further than they expected.*

"Q. Have you known in your experience this vessel to become perfectly unmanageable and turn clear around before they could control her?

A. Yes, sir."

* * * * * * *

"Q. That was known by your company and known by you as manager of that company before and at the time of the collision with the 'Dauntless'?

A. Yes, sir; I have known it to happen.

Q. And that, you say, is by reason of her construction?

A. Yes, sir." (pp. 83-84.)

On this point again the evidence is undisputed.

It further appears that the steam cylinder that controlled the rudder was 6 feet too long; that in order to correct this imperfection a "trip" was placed upon the cylinder, and subsequent to the collision the cylinder was cut down 6 feet (pp. 164-168). Though it is strenuously contended that this was only done for the purpose of economy in steam, we do not think that is borne out in the face of the examination which follows. It is more than likely, if not certain, that the imperfect cylinder was the cause of the imperfection in the vessel's steering; but, if it were not the cause, the petitioner is still not relieved, because the fact that she *did steer imperfectly* is the ultimate fact proving her unseaworthiness. This petitioner knew, and the reason for such imperfect steering becomes immaterial. They had no right to use a boat taking chances of an accident such as this.

The only alternative to this position is the contention that the collision was the result of pilot Rideout's negligence.

We start again, however, with the fact that the vessel got away from him, and the admission of the then manager of the petitioner that "it required a man *who un-*
" *derstood her and was steady*, not to give her too much

"wheel * * * because *she would go further than "they expected*". (p. 83.)

If that be the ground taken, then it also appears that pilot Rideout did not understand her, and petitioner took no precautions to inform him. She was not the regular boat on the run, but was an extra upon this occasion, to take the place of another boat that had been laid up. Neither was Rideout regularly employed on the "stern wheel steamers". "He was a *tugboat man* and attended to other business", and had been on this steamer once before. When put on board this vessel the manager did not warn him concerning this peculiarity of the "Mary Garrett", said nothing to him at all, "left him to find that out by his experience". (p. 98.)

This testimony is also undisputed.

In either event, therefore, the petitioner was privy to this accident, for the vessel had the fault, and was therefore unseaworthy, and they knew it. If the pilot was, from lack of experience with that vessel, unable to control her or handle her properly, where other pilots may have controlled her, or handled her properly, petitioner knew it and was at fault for taking Rideout from the tug boat and placing him in charge of this vessel on the extra trip, and was also in that respect privy to this accident.

Since the testimony upon this subject is uncontradicted, we contend that the order granting petitioner a limitation of liability was erroneous, and should be set aside.

III.

THE AMOUNT OF DAMAGES AWARDED THE UNION TRANSPORTATION COMPANY.

If either party have a right to complain respecting this matter, it is the Union Transportation Company, and not the petitioner, for the damages awarded were, under the evidence, too low, and not too high. If, therefore, the question be opened at all, we shall contend for an increased award, the ground of which we shall presently indicate.

Court Will Not Disturb Finding of Commissioner.—In the meantime, we do not close our eyes to the fact that the question of damages is one which, if the rule adopted for its ascertainment be correct, this court will not entertain.

It is true, as suggested by the appellant, that most of the testimony respecting damages as submitted to the commissioner, was not taken in his presence. The commissioner, however, considered it in arriving at his conclusion. His report having been filed, the matter was again taken up *before the court and argued and submitted on briefs.* The court thereupon also gave it careful consideration, and affirmed the report of the commissioner.

It is a rule, as we understand it, that, on such questions, the report of the commissioner will not be disturbed unless error or mistake is clearly apparent. The Circuit Court of Appeals for the Second Circuit (Pana-

MA R. R. Co. v. NAPIER SHIPPING Co., 61 Fed. 408), in passing upon this precise question, said:

"The conclusions of such an officer, *like those of a master in chancery,* will not be disturbed as to matters of fact which depend upon conflicting testimony, unless error or mistake is clearly apparent."

The exceptions under consideration in that case raised some of the very questions raised by the present exceptions, and among them was the question "Whether the expenses and losses incurred by the libelant were, or were not, enhanced by any want of diligence or prudence on its own part."

So also in LA BOURGOGNE, 144 Fed. 783, it was said:

"The question is not what the conclusion of this court should be on the testimony but whether the commissioner's report, sustained as it was, after full argument, by the District Court, was so clearly erroneous as to warrant us in setting it aside. The powers conferred upon a commissioner in admiralty causes are analogous to those of masters in chancery and his findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses should not be disturbed unless clearly erroneous."

Touching a master's report, this court has said in:

LAST CHANCE MINING Co. v. BUNKER HILL MINING Co., 131 Fed. 587-8.

"Findings of fact made without any evidence to support them, may, and should, as a matter of course and law, be disregarded; but findings made by a master in pursuance of an order to take the proofs and report the facts and conclusions of law to the court, that depend upon conflicting testimony, or upon the credibility of witnesses, *especially where, as in the present case, they are*

approved by the trial court, will not be disturbed.'' (Citing a very long list of authorities.)

This places the question in the same position as the case where there are successive decisions of two courts on questions of fact, which, it is uniformly held, are not to be reversed unless clearly shown to be erroneous. That this court had such rule in view in the Bunker Hill case was shown by the nature of the cases cited in support of the above proposition.

Rule Adopted for Ascertaining Damages.— But it is said (Brief, p. 33) that the commissioner based his damages upon the original cost of the vessel, less deterioration, whereas he should have ascertained the market value.

Assuming this to be the fact, what is the result?

The only competent testimony of her market value in the record is that of Alfred Anderson. He was secretary and manager of the California Navigation & Improvement Company, and had been connected with that company for eighteen years. The company owned and operated 12 or 14 steamers of the type here in question on the Bay of San Francisco and rivers tributary. The steamer ''Captain Webber'' was a duplicate and sister ship of the ''Dauntless''. (pp. 269, 282-3.) He purchased the ''Captain Webber'' in March, 1905. He made a thorough examination of her. (p. 252.) For the ''Webber'', the ''Columbia'' and the good-will of the Union Transportation Company, Anderson paid $50,000. The

good-will figured as naught in this transaction, and the value of the "Columbia"—$10,000, (pp. 262-3), which left $40,000 paid for the "Webber" in her run down condition. (p. 257.) She was in a very run down condition, however, which necessitated repairs to the extent of between thirty and thirty-five thousand dollars, (p. 261), making her value at that time, in good repair, from seventy to seventy-five thousand dollars. Add to this the consideration that Anderson was buying from a failing concern.

The "Dauntless", on the other hand, was at the time of the collision in a first-class condition. "She was well " kept up; she had a new shaft, and her boiler had been " rebuilt, and she had been repaired with new planks." Captain Goodell says he personally had charge of the boat from the time she was launched, and knew her condition, and she had been well kept up. (pp. 224, 225, 232.)

Under these conditions, with that detail knowledge of the nature and construction of the vessel, with *a market value established* by the sale of her sister ship, with eighteen years' experience—not as pilot—but as *manager, constructor, purchaser and seller* (pp. 251-252), Mr. Alfred Anderson's estimate of the market value of the "Dauntless" at the time of the collision, at $50,000, is a conservative estimate. (pp. 250-51.)

There is no witness called for the petitioner in anywise equipped as Mr. Anderson to form an opinion of that value. There would be no more accurate means than this of determining a market value outside of the

actual sale *before the collision* of the "Dauntless" herself.

We do not think it necessary to review the testimony of the "witnesses familiar with steamboats" produced by petitioner, and whose testimony he says was discarded. A casual examination of their testimony will be enough to convince the court that it is of no value; that they have neither the experience nor any other data upon which to found a judgment, and their testimony is the wildest and most haphazard guessing.

Upon the showing made to qualify them as experts upon the question of value, their testimony should have been entirely excluded.

New York etc. Mining Co. v. Frazer, 130 U. S. *620;*

Stillwell etc. Manf. Co. v. Phelps, 130 U. S. *527.*

"Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; *and his decision of it is conclusive,* unless clearly shown to be erroneous in matter of law."

Stillwell etc. Mfg. Co. v. Phelps, 130 U. S. 527.

The comment of the commissioner is, therefore, justified, namely:

"The testimony introduced on behalf of the petitioner as to the sound value of the vessel is quite unsatisfactory. There is a large element of uncertainty in the fixing of such values, even upon the testimony of experts who have carefully examined the vessel for the purpose of ascertaining its value. For the commissioner to base his estimate of value upon the opinion of witnesses who have never examined the vessel, and who are lacking in

specific knowledge of her condition, would be to add still another element approaching unfairness to the parties at interest." (pp. 211-12.)

Since none of the foregoing applies to the testimony of Mr. Anderson, and since his testimony has allowed for all depreciation, we contend that the commissioner should have found the sound market value of that vessel at the time of the collision, at the sum of $50,000, to which should be added $10,000 for furnishings, or a total of $60,000, instead as he did of $39,834. The deduction for depreciation had already been allowed for by Mr. Anderson in his value of $50,000. (pp. 257 and 260.) The deduction by the commissioner of 33⅓% was unwarranted by the evidence, for the vessel was only nine years old and well kept up, with recent important repairs.

We therefore complain of the $39,834, which we contend should have been $60,000.

Other Evidence of the Damage.—That the damage ascertained by the commissioner was not excessive, is shown by other evidence in the case.

It is admitted by all of the witnesses for the petitioner that the "Dauntless" was a more valuable boat than the "Mary Garrett". The "Mary Garrett" was in this proceeding adjudicated to be of the value of about $33,000. Making no allowance whatsoever for the admittedly greater value of the hull of the "Dauntless", but adding the value found of her furnishings, $10,000, we would have an admitted value of over $43,000.

Evidence of the Cost of Repairs.—The principal complaint of appellant appears to be a contention that our damages should not be determined by the value of the vessel before the collision, but should be estimated by ascertaining the actual cost of restoring her to the condition in which she was before the collision. This contention is based upon an assertion that the vessel in the case at bar was not a "total loss" within the meaning of the rule as laid down by the Supreme Court.

We reserve for future discussion the decisions upon which this alleged rule is based. Our present purpose is but to exhibit the figures which establish the fact that this vessel was a total loss from every practical business point of view, and that is the point of view from which the law determines the question. We are not here engaged in a metaphysical discussion. If we were, it would be safe for appellant to advance the contention that there never could be a total loss, for science teaches us that nothing on the face of the earth is totally lost; it is simply a transformation from one combination of elements to another.

This is the result of the very cases on which appellant relies. The Reno shows that the case where she cannot "be repaired *advantageously*", is a total loss "constructively" (Appellant's Brief, p. 2), and The Catherine speaks of the "feasibility" of raising her and of her repair (Id., p. 22); The Baltimore denies damages for a total loss "where it appears probable that the "vessel and cargo may be raised *without much expense* "and restored to the owner." (Id., pp. 26-27.)

However, we have here a vessel, the sound value of which has been determined by the lower court to be, in round figures, $40,000, and it has further, by the same court, been determined that as she lay in the bottom of the river as a result of the collision, her value was about $4,000. So large a reduction in value would indicate at once that it would be cheaper to build a new boat than to attempt to restore her. To a practical man that is a total loss.

But proceed a step further. It also appears that her original construction, without the Texas deck, *cost* $51,000, and with the Texas deck, according to Commissioner Brown's finding, $56,000, to which should be added the cost of her furnishings, $10,000, making a total cost of $66,000. It further appears in the testimony that since the building of these vessels the cost of construction has increased. Starting with a value of $4,000, *we have, therefore, in view, a prospective expenditure of $62,000 to restore the vessel to her former condition.* It is an acknowledged fact that reconstructing an old vessel is always more expensive, and brings poorer results, than the building of an entirely new one.

In view of these facts—a four thousand dollar value in an injured, stove-in vessel 9½ years old, with a prospective expenditure of $62,000 to restore her—can there be much doubt whether or no in the exercise of sound business judgment it would be deemed wiser to abandon the vessel altogether and build an entirely new one for $66,000 rather than spend that amount, perhaps more, in the reconstruction of an old one? It seems to us

that in a business sense this proves a "total loss" within the meaning of the rule for the ascertainment of damages. More than that. The evidence by which this was established *is the evidence of the cost of building her,* and, hence, is prima facie evidence of the *cost of restoring* her. Such prima facie evidence is sufficient to support a finding. Against it no evidence is offered by appellant. It is, therefore, sufficient to entitle us to a judgment for $62,000.

This condition is further illustrated by the reconstruction that was in fact attempted. E. V. Rideout, who purchased the vessel, "made rough repairs on her, just "simply fixing the hull and straightening her up; put "in the hog chains again and put on a rough freight "house * * * a house on to cover the freight and "for the men to sleep in." (p. 219.) That the repairs actually made by him cost him $16,000. (p. 219.) With these repairs we have an ordinary rough freight boat, with no houses or cabins upon her at all. He further testified that to have restored her houses would have been very expensive repairs. (p. 220.) How expensive he does not say.

However, to have built the vessel *new, to the extent that Rideout restored her* would not have cost much more money. Goodell, on petitioner's cross-examination, testifies (p. 237), that the hull of a vessel like the "Dauntless" would have cost from $7500 to $10,000, *brand new;* that her boilers were about $4,000, her shaft $700, and the machinery, he does not know. But allow-

ing $5,000 for the machinery, which would be liberal, we would then have, taking the extreme figures, $19,700—say $20,000 for Rideout's *restored* "Dauntless", *without any upper works.*

The original cost of the vessel, with the Texas deck, is found by the commissioner to have been $66,000, with her furnishings. (p. 210.) Deduct the above $20,000—the amount which the evidence shows it would have cost to build her to the point as restored by Rideout, and we have $40,000 *as the expense necessary to complete* the repairs *begun* by Captain Rideout. He is, therefore, justified in saying that to have restored her houses would have been *very expensive.* Add to this $40,000 the $16,000 already spent by him, and we have $56,000 as the cost of restoring said vessel, which, oddly enough, tallies with the sound value placed upon the vessel by the commissioner, *without allowing for deterioration and without* furnishings. (p. 211.)

We think the foregoing is sufficient evidence for a prima facie showing, *in accordance with the rule contended for by appellant,* of the cost of restoring that vessel, and entitles us to a much larger judgment than was awarded us, viz., a judgment of from $56,000 to $62,000.

The foregoing figures and the testimony by which they are arrived at, should be considered in the light of the following by Dr. Lushington, in the case of The Gazelle, 2 W. Rob. Adm. 281, 284

"The right against a wrongdoer is for a restitutio in integrum and this restitution he is bound to make

without calling upon that party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him."

So, also, Fed. Cas. No. 9345:

"In a collision case the party in fault should bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained."

In this connection, the death of Mr. Gillis, before the reference to ascertain the damages, is an important factor, not to speak of the loss of records by the fire of April, 1906.

They should further not be heard to complain, because they were given an opportunity to make the repairs. After the "Dauntless" was raised, Mr. Gillis went a second time to the petitioner with respect to the repairs or the disposal of the wreck. "The request was that " Mr. Gillis offered the Navigation Line the wreck to " repair, to put in place as it was destroyed, or to pay " him for the wreck." (pp. 271, 274.) The request was ignored.

Testimony of Original Cost Not Hearsay.—It is suggested that the original cost of the vessel was fixed from hearsay testimony, but that is erroneous. Mrs. Gillis was testifying from knowledge obtained from

her participating in its construction, the books of account, and the account of material (pp. 280, 281) which show the original cost to have been $51,000, without Texas deck or furnishings.

Comment is made upon the fact that respondent did not call the Fulton Iron Works or Mr. Marcucci to testify. If such testimony were procurable and would be unfavorable to respondent, why did not appellant call them? Such witnesses were as accessible to them as to us. They owe no special allegiance to respondent. The respondent did not require them, for they could testify no further than Mrs. Gillis did, if so far.

IV.

THE DECISIONS RESPECTING THE RULE BY WHICH THE DAMAGES ARE TO BE ASCERTAINED.

We think the facts of our case, make the rule of damages adopted by us conform strictly to the rule established by the Supreme Court. Whether the cost of repairs or the sound value at the time of the collision shall, in a given case, be adopted, depends entirely upon whether or no "a prudent uninsured and unindemnified owner" would have adopted the one or the other course. The Cambridge, 2 Low. 26.

In The Baltimore, 8 Wall. 377, cited by appellant, the rule is stated as follows:

"*Restitutio in integrum* is the leading maxim in such cases, and WHERE REPAIRS ARE PRACTICABLE the general rule followed by the admiralty courts in such cases is

that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred", etc.

* * * * * *

"Restitution or compensation is the rule in all cases WHERE REPAIRS ARE PRACTICABLE, *but if the vessel of the libelants is totally lost, the rule of damage is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction.*"

* * * * * *

"Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the circumstances were such that the vessel could not be raised and saved, *or that the cost of raising and repairing* her would exceed or equal her value after the repairs were made."

* * * * * *

"Decided cases may be found where it is held that the owner of the injured vessel is not bound to raise the vessel in a case where she was sunk by a collision; but it is clear that the court cannot award damages for a total loss, where it appears probable that the vessel and cargo may be raised *without much expense,* and restored to their owners."

The facts of the case at bar bring our case within that part of the rule which fixes the damages at "the market value of the vessel".

In the case of THE FALCON, 19 Wall. 75, the Supreme Court had occasion to define what is meant by the language of THE BALTIMORE. In that case it appeared that before the hearing in the Circuit Court,

"The respondents took testimony showing that the schooner had been raised, repaired and put in good con-

dition. At whose instance and at what cost this was done, and by what right those in possession claimed to hold her, are not shown; nor is it alleged or proved that she was ever tendered back to the appellants. The appellees insist that the facts disclosed entitle them to have the decree of the circuit court affirmed, and rely upon the case of The Baltimore, 8 Wall. 378, as an authority to that effect. This is a mistaken view of the subject. In the case of The Baltimore the libel alleged a total loss. The answer expressly denied it. There the sinking was in the River Potomac. The water was shoal; the masts projected eighteen feet above its surface, and the position of the hull was clearly discernible. The vessel could have been easily raised and repaired. Here the libel alleges substantially a total loss, and the answer substantially admits it. No point to the contrary was raised or suggested. The schooner was sunk in the Chesapeake Bay, where the water was five fathoms deep. It is clear from the proofs, that she could not have been raised and repaired *without a large expenditure of time and money. The case of The Baltimore has, therefore, no application* to the case before us."

In the same connection the Supreme Court then considers the cases of The Empress Eugenie and The Columbus, two English cases.

In the latter case it appears that the sunken vessel was raised by the owners of the colliding vessel. Notice was given to the owners of the sunken vessel, with an intimation that the owner of the colliding vessel was ready to deliver her up, and would not be responsible for any further damage or expense that might be incurred by her remaining unrepaired in the harbor. *It does not appear whether she was repaired or not.* The English court said:

"That the owner of the smack 'was not bound to repair her, and might have left her lying in the port', and

that the proper course would have been to apply to the court for an order that the smack be sold and the proceeds brought in to abide the result of the suit. The Columbus (the colliding vessel) was held liable for the full value of the smack as if there had been a total loss; but it was also held that the owner of the Columbus might still apply for an order to sell the smack, and that 'the proceeds of such sale will be his own property'. ''

Of this the Supreme Court said:

''*We think that case lays down the proper rule.*''

In The Eugenie, mentioned in The Falcon,

''It was held that the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would, in the ordinary course, have been delivered, together with the cost of raising and the cost of placing the ship in the dock for inspection, less the value of the wreck as raised.''

We must, therefore, accept The Eugenie and Columbus as expressing the rule of our own Supreme Court, and it is precisely the rule adopted by us in the case at bar.

We have raised the vessel, and have not repaired her because of the great expense; are asking the market value of our vessel at the time of the collision, and are tendering to the ''Mary Garrett'' her value as raised, namely, $4,000.

In The Falcon the schooner was sunk in five fathoms of water—30 feet,—in this case the steamer was raised from a depth of 60 feet.

It also appears that in her damaged condition, lying at the bottom of the river, the ''Dauntless'' was worth

$4,000; that she was raised, and $16,000 spent upon her to restore her hull and build a rough house upon her to keep the freight from getting wet.

Captain Rideout testifies:

"Q. All the upper works, together with their furnishings, were all gone?
A. Yes, sir; there were some pieces of her house left, but we had to tear it off.
Q. Those would have been very expensive repairs if she had been put back in the condition she was?
A. I should imagine very."

As already shown, those repairs would have cost from $56,000 to $62,000.

So, we think the facts of the case bring us fairly within the rule laid down in The Baltimore as explained in The Falcon, and that it was *not* necessary for us to repair said vessel, but that we are entitled to her value in a sound condition, as for a total loss.

Appellant seeks to distinguish the Falcon case because, as suggested by us in the lower court, it was there said that "The libel alleges substantially a total loss and the " answer substantially admits it", in which respect it is argued the case at bar differs.

We will not enlarge upon this phase of the controversy, though appellant's own statement shows that he might have amended his libel to meet the issue. Be that as it may, however, it does not affect the authority of the Falcon case as applied to the facts of this case, for it was there expressly held that the Baltimore had no application to that case "because it is clear from the

"proofs that she could not have been raised and re-
"paired *without a large expenditure of time and*
"*money*". The case of THE BALTIMORE is further distinguished, explained and limited by that court's recognition of the language of THE COLUMBUS, with the indorsement "We think that case lays down the proper rule."

We think this sufficient upon the subject, because if our interpretation of the language of the Supreme Court be correct, that expression of opinion is final.

We cannot, however, refrain from calling attention to two other decisions which not only illustrate the present question, but one of which also places the allowance of interest upon a basis different from that conceived by the appellant. We refer to THE AMERICA, 11 Blatchf. 485. In that case, as in the one at bar, the vessel was sunk and raised, but not repaired.

In that case the commissioner in his report allowed for a total loss, and in addition allowed for interest on the items of damage.

The court said:

"There is nothing to show that the libelant did not exercise a just and wise discretion in raising the Fairfield. Until she was raised it was impossible to determine whether she could be repaired without too great expense. Indeed, had she not been raised, and the libelants had come into court claiming her value, the objection that they should have raised her or proved that she could not be raised and repaired, would have been effectually urged by the claimants of the America. The libelants were at liberty, and, in fact, bound to go far

enough to enable proof to be given of the extent of loss."

* * * * * *

The court also said:

"Interest is as necessary to indemnify as the allowance of the principal sums. But if the allowance of interest rests in discretion, still, the indemnity of the party for injury from a collision occurring through the fault of another vessel, should be the object of the court in the allowance of damages. In this view, such allowance was, I think proper. It is, in such case, not allowed as punishment. It is not like the allowance of punitive damages in actions of slander, assault and battery, and like cases. *It gives indemnity only.*"

To the same effect is the case of The Havilah, 50 Fed. 331, a decision of the Circuit Court of Appeals of the Second Circuit.

In that case the vessel was raised and repaired, and the libelants claimed as their damages the cost of raising and repairing her, which exceeded the sound value of the vessel before the collision.

The court held that the true rule of damages, in that case, was the sound value of the vessel before the collision, and the decree of the lower court was reversed, with instructions to enter a decree for the libelant for the value of the ship, cargo, freight and personal effects on board before the collision, as found by the commissioner, *with interest* from the date of the probable termination of the voyage, and the costs of the District Court.

The Falcon, also, as seen ante p. , recognized *interest* as an element of damage, viz., "with interest from " the date when the cargo would, in ordinary course, " have been delivered", etc. 22 L. ed. p. 99.

In conclusion, we wish to impress upon the court the fact that the market value of the "Dauntless" was fixed by witness Anderson at $50,000. This did not include the furnishings of the vessel, which have been found to be of the value of $10,000, which makes the true amount of our damages for which we should have received judgment in the lower court $60,000, with interest.

V.

THE CHARGE THAT THE OWNER OF THE "DAUNTLESS" INCREASED THE DAMAGE BY FAILURE TO ACT PRUDENTLY AND QUICKLY, OR TO SEEK THE BEST PRICE FOR THE VESSEL ON HER SALE.

We regard this question as absolutely foreclosed under the rule hereinbefore suggested on which this court acts with respect to questions of fact found by a commissioner or master in chancery.

However, we have no disposition to avoid the issue, for we regard the charge as absolutely groundless and born of a desire to catch at some straw to relieve appellant from a fair settlement of the damage he has caused us. In doing this, advantage is taken of the fact that the principal actor, Mr. Gillis, was dead, and many words are put into his mouth with the certainty that they could not be contradicted, by witnesses, some of whom have grievances and some of whom were partisans of the petitioner.

Before addressing ourselves to the facts, it might be well to consider what the duty of the injured vessel is, in this regard.

It must be apparent that that duty is fulfilled when *reasonable* diligence, under the circumstances, and reasonable skill are employed by the injured vessel. It will not do for the wrongdoer to charge the injured party with a damage unless he can show that the injured party has not attempted in good faith to save the vessel from further injury. As said by Dr. Lushington in The Pensher, Swabe, 211, 213:

"It is admitted that the Pensher is to blame for the collision, and the consequence of this is, that all the damage arising from the collision must be borne by the Pensher, unless it can be shown *by clear and positive evidence* that any part of the substantive damage arose from *gross* negligence or *great* want of skill on the part of those on board of the vessel damaged."

The same learned judge in The Mellona, 3 W. Rob. 713, further said:

"In all cases of this description, there is the prima facie presumption; and great, indeed, would be the inconvenience, and still greater the difficulty, if in all cases of this kind when the vessel did not go down immediately, but was subsequently lost, the court had to enter into an investigation whether all the measures adopted on board the damaged vessel were right, or whether if other measures had been pursued, the vessel might not have been saved."

In the case of The Nellie, 2 Low. 494, Judge Lowell held (Syl. Fed. Cas. No. 10096) that:

"If the master of a vessel injured by collision through the fault of the other party, conducts himself

with *reasonable skill and diligence* after the collision, the damages occurring from a necessary act, such as beaching his ship, will be chargeable to the wrongdoer. Such damages were allowed though the master was informed that a better place for beaching his vessel was to be found."

In that case the learned judge comments upon The Catherine, 17 How. 170, which, he says, resembles two English cases, to which he refers, and says:

"They were all clear cases of a *reckless negligence* almost amounting to the *wilful loss of the vessel,* which might easily have been, and in the American case [he refers to The Catherine] actually was, saved and repaired at a comparatively trifling expenditure;" etc.

Judged by these standards, no fault can be found with those representing the "Dauntless".

Immediately after the collision, Mr. Gillis applied to Mr. Whitelaw to get from him a figure for raising the vessel, but could not agree with him as to the price, and therefore did not employ him. At that time he thought the price exorbitant, and Whitelaw's only answer is that "we are not in that business for pleasure". (p. 297.)

Now, whether it be true, or not true, that Mr. Whitelaw could have raised the vessel in a shorter time than was actually employed for that purpose, the refusal of his services upon the ground stated, was a reasonable act on the part of Mr. Gillis done with the intent of saving the party upon whom the damage must fall from what he considered an improper expenditure.

That he had the interest of the petitioner in view, is proven by the next step taken by him, for he immediately

applied to the petitioner itself to secure its aid in raising the "Dauntless". "The Navigation Line was informed " that their steamer the 'Mary Garrett' had sunk the " 'Dauntless'; that Mr. Gillis was powerless; that he had " no equipment to raise the vessel, and he asked the " Navigation Line to come to the rescue of the vessel." "They made no reply whatever." (p. 270.)

Two or three weeks later he attempted to raise her himself, and in that work he employed the very men that Mr. Whitelaw must have employed for the same purpose, in fact Whitelaw's own pumps and wreckers, Roach and Tucker (p. 291); the latter had been in Whitelaw's employ for over twenty years. It is true he also employed other men, among whom was Robert Don, who testifies that he was trying in good faith to do what he could, and had a full, free hand allowed him for that purpose (pp. 323-24), but he did not succeed and had a falling out with Mr. Gillis, and was succeeded by Mr. Roach. By this time the petitioner had come to his aid by the loan of barges and some equipment.

If there be any complaint to be made on account of delay in initiating proceedings, the fault is that of the petitioner in refusing the first application for aid. So far as Mr. Gillis is concerned, the testimony shows diligence and a prudent regard for the cost.

But it is not true that additional damage was suffered by reason of the course pursued by Mr. Gillis. We have not time to go through the voluminous record to point out the testimony showing that the sliding of the vessel into deep water could not have been avoided. Upon this

subject the testimony is sufficiently plain, and the court will not miss it. Suffice it to say, that when the "Garrett" left her she was upon an inclined plane, a sliding bank, toward the deep water; there was no feasible means of holding her in place by anchors. But whether that be true or not, the expense of raising her was not thereby made excessive. Whitelaw wanted $5,000; Mr. Gillis expended $5,500.

Neither did she suffer any extra damage by reason of the length of time she was submerged. It is true Mr. Whitelaw says he thought he could complete the job in from ten to fifteen days. He may be a man of experience, but he is also notoriously oversanguine. Upon an enterprise of that sort, experience teaches and the testimony establishes that they never can determine beforehand the length of time it will require, nor even the nature of the appliances that will have to be used. Whitelaw is himself compelled to admit it. (p. 300.) Upon this subject, the testimony of Tucker whose experience and intimate knowledge of the conditions of this vessel are undisputed, is conclusive. (pp. 477-478.)

The danger anticipated by Whitelaw from her lengthy submersion, was the suggested accumulation of mud in her, whereby the weight would be increased.

He says that unless she was exposed to a choppy sea, or a strong current, two or three months under water would not hurt her upper works any, not beyond starting the paint (pp. 294, 295), and that the precipitation of mud in her, the accumulation of sand inside of her, was

the greatest danger (p. 293.) That this danger has no effect until you come to lift her. (p. 294.)

Tucker, who did the lifting, says that she suffered no damage from that source, and that she had very little mud in her; that what she had in her had no effect whatever in increasing the damage.

"Q. Did you find any mud in her as she came up?
A. There was a little sediment in the cabin and on the deck.
Q. What did you do with that?
A. As she came up we washed it off.
Q. Did that mud that you found in there have any effect in injuring the vessel by way of weight or otherwise as she came up?
A. No, sir; I don't think there was enough to do any damage. It may be it added a little weight on her, but not enough to break down or destroy the house work." (p. 473.)

This seems to set that question at rest.

It stands to reason that until a vessel comes to the surface the extra weight of mud would make little difference, and when it did come to the surface it was cleaned out.

It further appears from Tucker's testimony that there was no damage to the houses, other than that which was caused by the collision. He describes the fallen-in condition of the houses, and from his observation of it he expressed the opinion that it was caused by the collision.

This opinion is fortified by the testimony of the pilot of the "Mary Garrett", as well as that of the mate of the "Dauntless".

Rideout is asked by the petitioner if he broke anything connected with the "Dauntless", and he answers: "At " the first occasion I believe I went alongside to take the " passengers off. She was—the guard of the 'Garrett' " pushed into the stanchion of the 'Dauntless' on the " side of the house."

"Q. What stanchion do you mean?
A. I mean the side of the freight house." (p. 401.)

Berringer, another witness on behalf of the petitioner is asked:

"Q. Do you remember whether or not the 'Mary Garrett' when she came along side of the Dauntless mashed in the sides of the house?
A. Yes, she crushed the upper deck there, the cabin deck.
Q. What was the position of the vessel at that time?
A. She was partly sunk then; she was landed right on the upper deck, you might say; she came right under the upper house. The hull was under water then.
Q. And crushed them in?
A. Yes, sir; crushed them in." (pp. 424-425.)

This testimony is undisputed.

Tucker, who saw the vessel when she came to the surface, testifies that the injury to the houses was in his opinion the result of the collision, and describes it, viz.: that the stanchions *at the point of collision* had been knocked out, causing the houses to sag from both ends toward the point of collision, and also from the starboard to the port side. (pp. 486-487-490.)

He says the stanchions underneath the flying deck were all carried away on the side she was struck, which caused the house to fall down on that side. They were

all leaning over to port and nothing to support them and racked the houses; the cabin doors were broken off.

Her sliding into the deeper water did not increase the injury, but if it did, it was no fault of the "Dauntless". In the first place, she was pulled off of the bank on which she had originally settled by the "Mary Garrett". (Berringer, p. 421; Goodell, pp. 227-228-305-311-312-313.)

In that position she could not be held.

Much is said about carrying out anchors. At the time of the accident, and before she slid off of the bank, it was necessary to look after the passengers. "There " were lots of women and children there, screaming and " crying and taking on; we had all we could attend to." (Goodell, p. 305.) "Everything was done that we knew " how that could be done." (Berringer, p. 424.) Neither anchors nor dead-men would have held her." (Rideout, 401; Strother, pp. 343-344-345.)

We are sorry that time does not permit us to go further into details upon this subject, but we think the foregoing references to the pages of the testimony will be sufficient to enable the court to identify it in the record. We feel satisfied that neither the commissioner nor the District Court made any mistake upon the question treated under the foregoing head, and that the testimony is not only sufficient to warrant their finding, but that the contention of appellant in that respect is frivolous.

VI.

INTEREST.

Appellant's statement of the case appears to have been framed with a view of laying the foundation for a claim that the appellee was guilty of such delay in the prosecution of this suit as to warrant the court in denying us interest on our damages.

Respecting the bona fide prosecution of the suit, we have to observe that charging appellee with delay is one of the odd and amusing features made possible by the change of counsel at the end of a long and hotly contested litigation. No one of the gentlemen whose names appear attached to the brief had any connection with the case until just as the "curtain was being rung down". Their names nowhere appear in the record until we come to the assignment of errors on this appeal, (Record, p. 510), though they did appear in court and argued the exceptions to the commissioner's report on damages and filed a brief thereon. We feel certain that had they been familiar with the tactics employed in the litigation—a system of blocking progress at every point—they would not now make the charge. Though the entire proceeding does not appear in the record, sufficient does appear to substantiate our suggestion.

The collision happened on the *24th of August, 1901*, in the evening. Prompt action was taken against the appellee in the Superior Court. As stated in appellant's brief, "this was shortly after the collision". In addition thereto, a libel was filed in the District Court. Pro-

ceedings were allowed to progress along those lines for *two years,* when the appellant in *September, 1903,* took steps to block those proceedings by initiating this proceeding for limitation of liability. Outside of the claim of this appellant, there were involved only two other claims of *insignificant amount,* and the same result sought in this proceeding could have been attained by appearing and answering in the District Court, there setting up the limitation and consolidating the causes for trial.

September 19, 1904, a year thereafter, findings were made by the court, but no *decree* was entered on those findings until *January 18, 1905.* (p. 206.) The decree was, of course, petitioner's decree and prepared by it. No reason appears for the delay of four months in obtaining it. That decree referred the matter to Commissioner Manley. It also provided that *five days' notice of proceeding before said commissioner* be given to the persons who have presented their claims, and to the petitioner or their proctors or attorneys. Nothing appears in this record why the petitioner did not give the five days' notice and proceed with the taking of testimony. The appellee cannot be charged with the delay, for it appears that Mr. Gillis died on the 2nd day of July, 1904. (p. 267.) Mr. Gillis was president of the company and the only one who had first knowledge of the sources of testimony. The difficulty which this plunged us into will be appreciated by a perusal of the testimony of Mrs. Sarah H. Gillis, beginning at page 267.

By slow degrees, and after much fruitless inquiry for the sources of competent testimony on this subject, the data was gathered and placed in the custody of counsel at San Francisco. While this was proceeding, had appellant had any desire to forward the cause which was initiated by him, instead of a desire to delay it, it was in his power to initiate the proceeding before the commissioner by giving five days' notice as in the decree provided. He never saw fit to do so, and now desires to lay the charge of that delay at our door.

In April 1906, everyone knows what happened. Our records and data were destroyed, and we were compelled to initiate new proceedings to get competent testimony to prove our damages. In this connection, some allowance must be made for the disordered state of business in this community, and the thoroughly disrupted and upset state of affairs of individuals.

This lies within the knowledge of counsel, who makes no mention of it, but starts with the bald statement that "Not until November 6, 1907, is the taking of testimony "before Commissioner Manley begun". (Brief, p. 3.) Before it was submitted Commissioner Manley died, and the matter was allowed to lie by, *appellant* still making no move looking to the appointment of a new commissioner. Proctor for appellee, represented by his clerk, C. A. Shuey, appeared before the court on the 6th day of June, 1908, to move for the appointment of a new commissioner. On the 22nd of July following the testimony was closed.

This certainly does not show any diligence on the part of the appellant, who initiated the proceeding, to bring the cause to a final issue. On the contrary, though the proceeding does not appear in the record, he constantly opposed us in our attempts to forward the hearing, by motions of a continuance on the ground of his own unpreparedness to proceed. Evidences of this nature are part of the record, and, if not in this court, or if the fact be contested by appellant, can be brought here upon a suggestion of diminution of the record. These facts would seem to justify the exercise of the discretion of the lower court in favor of the allowance of interest. The question being discretionary with that court, who was cognizant of all the facts, it would seem that the question is no longer open for consideration.

As said in the case of The William Chisholm, 153 Fed. *714:*

"The commissioner's report included interest on the damages as is the usual practice. The appellant objected to this, for the reason that the case was so long spun out by delays in taking the testimony, which continued for several years; and the delays it was said were caused by the counsel for the appellees. It is not clear to us that the ground as stated is sufficient to require the withholding of interest. But in all events, the court below knew more about the circumstances than we can know. In fact, there is nothing in the record which we can lay hold of in order to judge whether the complaint is well founded or not, or whether one side was more responsible for the delay than the other.

"The result is that the decree of the court below must be affirmed, with costs."

VII.

SUGGESTIONS CONCERNING TAKING FURTHER TESTIMONY.

We understand the court has already made an order covering this matter, should our contention regarding the proper method of fixing the damages be not sustained. We think, however, sufficient evidence appears in the record to sustain the award under either mode of fixing damages. Should this court fail to agree with us, it does not seem that, with two courts (Commissioner and District Court) agreeing with our contention, it would be just to penalize us, for a failure to anticipate a contrary view by this court upon a question of that nature. It was as much in the power of appellant to supply evidence of the probable cost of repairs, as in that of appellee. It could only be done by the guesses of experts, which were as readily obtainable by appellant as by us. It will not do for them to lie by calling "check", "check", "check-mate". If they do, they cannot justly ask to have us penalized when we ask permission to supply what they declined to supply when it was in their power to do so.

We respectfully submit that the decree should be affirmed, or so modified as to deny the limitation of liability and the award increased to $60,000 with interest from the date of collision.

NATHAN H. FRANK,
Proctor for Appellee.

CAMPBELL, METSON & CAMPBELL,
Of Counsel.

No. 1769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Petitioner,
Appellant,

vs.

THE UNION TRANSPORTATION COMPANY (a corporation), THE PETER MUSTO COMPANY and R. L. SCOTT, Claimants,
Appellees.

In the Matter of the Petition of THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Owner of the Steamer "MARY GARRETT", for Limitation of Liability.

APPELLANT'S REPLY BRIEF.

CHARLES PAGE,
EDWARD J. McCUTCHEN,
SAMUEL KNIGHT,
Proctors for Appellant.

Filed this.....day of December, 1909.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In the Matter of the Petition of THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Owner of the Steamer "MARY GARRETT", for Limitation of Liability.

APPELLANT'S REPLY BRIEF.

It is claimed by the appellee that the court below erred in granting the appellant's petition for a limitation of liability. It is argued that it appears from the evidence that the steamer "Mary Garrett" was unseaworthy in her steering gear and in the pilot in charge of the ship at the time of the collision, and that the corporation ap-

pellant was privy to these facts. On this pure question of fact, a large amount of evidence was taken in the court below and the conclusion reached that the appellant petitioner was entitled to the benefits of the Act of Congress. An examination of the evidence discloses positively the three facts:

1. That the ship was in every respect, including her steering gear, seaworthy;

2. That she was in every respect, including the pilot in charge, properly officered and manned;

3. That the petitioner was in no way privy to the collision or to any fact or cause leading to the collision.

These points are all involved in the discussion of the evidence.

The collision occurred on the 23rd of August, 1901. The vessel had been duly inspected by the authorities of the United States on the third of January of the same year and had been properly licensed as a passenger boat for the term expiring one year from the date of inspection. An examination of the steering gear and an approval of its design and good condition are necessarily included in the granting of the official certificate. No criticism is attempted of the inspection made under the Act of Congress. In a case before this court, in which such criticism *was* made, it was said:

> "To this it may be said that if the local inspectors, who are public officers, failed to perform their duty, and made an insufficient examination of the vessel, the fault does not rest upon the petitioners, nor is there imputation to them of knowledge of

such defective inspection, they having delegated the whole matter of the inspection of their vessels to a competent employe."

The Annie Faxon, 75 F. R. 315.

Indeed, it may fairly be said that, legally, the strongest presumption of the correctness of a finding of fact applies, when that finding is made by expert men chosen by an impartial national authority and sworn to perform their official duty.

The charge is made that the steering apparatus of the "Mary Garrett" was improper in its original construction and consequently unseaworthy.

Mr. Glenn was the company's manager at the time of the collision. At the date of the trial, he was in the employ of the appellee. It was his duty to see to the equipment and condition of all of the steamers. He had been its manager from the date that the company started up to some period later than the date of the collision. He had known the ship for a long time, had sent her out on the trip in question, as on many others, testified that he considered her at all times a good, seaworthy vessel. She was of a short, broad type and turned more easily to one or other side, as all boats of that build do. This quality is by no means objectionable in a narrow or crooked river.

"They act more quickly. For instance you can make a bend quicker with it. When they get in motion, they will, unless the pilot is careful and steadies her up with his rudder quick enough, she will go further than he expects" (Glenn, 85).

"I did not consider this a defect. She is quicker and answers her helm quickly (Glenn, 89).

> "I think the steam gear was put in in 1898; I am not sure" (91). "I never heard she refused to obey her helm (97). I never heard she was unmanageable. In the San Joaquin, which is a crooked river, there are difficult currents and eddies, and in a river of that kind, all stern-wheelers will sheer more or less" (100).

The whole case on the subject of the right to a limitation can be found in the testimony of this witness, who, at the time he testified, was a servant of and was called as a witness by the appellee. Our opponents offered him against us and thoroughly proved our case by him. No one had a better opportunity of knowing the truth. He demolished the entire structure built by his new employers against the appellant when he says that in the nature of such boats they must tend to sheer more or less and that this tendency to sheer is under the control of the pilot, who must see to it that it is checked. The pilot, at the moment of the collision, was Capt. Rideout, a properly licensed man for those waters (99).

The point is intimated that the manager of the corporation failed to notify Capt. Rideout when he was first placed in charge of the "Mary Garrett" of the touchiness of the steamer with regard to keeping a straight course. It would seem that it might be assumed that a man officially commissioned as a competent pilot would know that a short and broad flat-bottomed boat must be more carefully noticed in her movements than one less liable by her build to yield to the force of currents and eddies in a river full of turns and of shallows. If he

did not know it, however, the vessel's tendency, by reason of her type, must inevitably force itself immediately on his attention. He had to steer her and if he found that, to keep her straight, he must attend to his tiller all the time, he would immediately be in possession of all the information needed. Rideout had acted as pilot on the vessel on a previous trip (98). The manager who appointed Rideout "considered him all right" (86). Indeed, Rideout testifies to his own knowledge of the ship's tendency to sheer when, first, in answer to the query whether his inability to control his rudder was due "to the imperfection of the steering apparatus", he answered:

> "I cannot say that; *no*" (p. 64).

and when subsequently he testified as follows (72, 73):

> "The wheel, you might say, had a habit of sneaking away from you, starting without your knowledge, if you did not have your hand on the wheel to notice it.
>
> "Q. Outside of that, there was nothing to account for the sheer.
>
> "A. I cannot say that, because loaded boats will sheer more or less at all times. They will take a sheer on you if the rudder is amidships.
>
> "Q. If they are properly loaded?
>
> "A. They are supposed to be properly loaded. You are supposed to overcome all these things. *Any loaded boat will take a sheer;* no matter how she is loaded. She will run from one side to the other. Sometimes it is all you can do to control it (72).
>
> "I think in this case, the wheel had gone over without my knowledge; that the rudder had gone over. I just judge so. I cannot say so, because I did not notice the position of the rudder at that time.

I immediately reversed the lever, so as to put the steam on the other way.

"Q. At any rate, as I understand you, this gear works in that way, that it is liable to happen to you at any time?

"A. It is liable to move at any time, if you do not watch it and give it steam the other way (73).

"She had sheered just before I put the helm over and she did not come in the way I wanted her (71).

"I cannot say what caused her to sheer now, because I was not noticing the position of the wheel at that time. There is no way of telling. There is an indication to tell the position of the rudders. It was in the middle of the pilot house. I was not noticing the indicator" (71, 72).

This witness, also, was one of the witnesses called by our opponents.

It is evident from his testimony that it was the type of boat which gave her a tendency to sheer. She "sneaked" when, as he admits, he was not watching her. If there was a fault anywhere, it was in the pilot's allowing his attention to be drawn from the indicated position of the rudders.

Another witness called by our opponents, and one of their then employees, was Jarvis, a pilot who had served in the vessel. He was as outspoken as Glenn, the once manager. Speaking of the tendency of the steamer to sheer, he attributed it to the type of the vessel, not the steering apparatus. The steam cylinder size *had nothing to do with it* (81).

Captain Strother, master of the vessel on the evening of the collision, testified that the steering gear was

a Turner steering gear, steam, *of recognized construction.* He had inspected it during the day of the collision. It had behaved all right up to ten minutes before the collision, at which time he left the deck. He supervised the stowing of the cargo, which was a small one for the capacity of the steamer. She had a full crew. Her equipment was that required by law. He knew of nothing affecting her seaworthiness (47, 48).

The witness knew the boat well. At one time he was her pilot for four months (50). She was in good trim on the night of the collision (51). He brought her 30 or 40 miles that night over a crooked channel. He had no trouble in steering. He never found the steering gear defective (52).

This witness corroborated all the others. The "Mary Garrett" answered her helm.

> "She is like all other boats. There is no boat that will go a straight course, that is, if you put the rudder amidships and let them go; you have got to steer them all the time. That is true of bay steamers as well as river steamers.
>
> "The pilot must watch his helm all the time (Strother 103).

There was an indicator to tell the pilot the position of the rudder and the amidships spoke had a piece of canvas round it. The pilot could tell by just glancing at it. He could correct any deviation by throwing his rudder one way or the other. After the accident, the witness took charge and handled the ship without difficulty to Port Costa. She handled all right, though wit-

ness had to do at one time what he thought was the most difficult piece of steamboating he had ever done (105).

On the trip of the collision the steering gear from commencement to end was in order (106). The witness never found the boat difficult to handle (107).

As to the steering gear, he had never heard any one say it was not up to standard (114). Some pilots

> "did not like it as well as other kinds and some liked it better than other kinds (115).
>
> "Q. What effect on the operation of the rudders did the length of the cylinders have, if any?
>
> "A. When the gear was in good working order, it did not have any effect at all.
>
> "Q. The length of the gear required more steam to operate it?
>
> "A. That is all.
>
> "Q. When the trip was put there, the length of the piston was controlled?
>
> "A. Yes, sir.
>
> "Q. When it reached the shutting-off point, the trip operated to shut off the piston?
>
> "A. To shut off the steam" (117).

Captain Cruthers, another of the witnesses called by our opponents, testified to the fact that he "did not like" the steam gear. "It seemed to hang fire. She did " not pick herself up in one way. I have forgotten " whether it was hard a-starboard or hard a-port. She " would hang. The trip would catch and would not " take the steam" (p. 124). This witness could not tell what relation the length of the cylinder, which *he had been told was too long,* bore to the rudders, if any

(p. 125). He corroborated the others, however, in the fact that she would easily sheer if she touched in shallow water.

> "I do not say that she answered her helm too quickly. I say she would smell a shoal and run with you; she was very quick to run when she smelled a shoal" (p. 124).
>
> "She used to change and would not come up right away—nothing would move. It would take her some time. I would have to help her over" (124).

The handling of the ship again is shown to have depended on the attention which the pilot was giving to his steering.

Paul another employee of the appellee, testified that the wheel would quickly come back on the pilot when he was making a landing, and, by reason of the fact that he was looking out of the window, he could not see the wheel. When he found the vessel was swinging, he turned to and straightened her up (151).

> "Of course, when you steered along straight in the reach or on the bay, you could watch it; but this was making a landing or getting around the turn" (152).

In other words, *if the pilot left the wheel* at a turn or at a landing, it might not stay in the position in which he last saw it; if he was steering the ship, it was all right. It would seem that in making a landing, the pilot might better blame himself for not calling somebody to watch the wheel, than blame the wheel itself. It is strange, too, that in all of the five months of his pilotage on the "Mary Garrett" in the navigation of a crooked and often shallow river, he never had any trouble in steering past other vessels or met with an

accident (155). The reason is evident. He says: "I got on to it quick" (155). In other words, an intelligent pilot would at once know what his steering gear was and handle it accordingly. To say that such gear, if it were true that it needed closer attention than other gear, is unseaworthy is an absurdity.

The petitioner called Capt. Potvine an old pilot who had served on the "Mary Garrett" and knew her. He testified that he had never found any defect in her steering gear, or found that the ship failed to answer her helm or that the gear stuck. She had never run away with or turned on him, nor had any pilot, to his knowledge, complained about her steering gear.

Hornburg (185), Kennedy (191) called for the petitioner testified in the same way.

The only witness in the case competent to testify, by reason of professional knowledge, concerning the steering gear was Burns, port engineer of the petitioner, whose business it was to see that all mechanical parts of the company's boats were in good working order. We shall not attempt to discuss what he says. He speaks understandingly and fully on a subject with which he is conversant. He joined the Company at the very moment of the collision and therefore, was competent, if he examined the ship, to tell what the conditions were at the precise time.

Our examination of the testimony of the witnesses called against us is in greater detail. The very meagre case made in opposition to the limitation granted by the

lower court was shown barren of any reason whatever by the testimony of Burns.

We submit that on this point, the lower court's action is shown affirmatively to have been correct. The nature of the case shows that the petitioner was not privy to the collision itself.

AS TO THE DAMAGES.

No better argument can be brought forward of the *necessity* of the rule laid down by *The Catharine,* 17 How. 170 and followed ever since by the courts of admiralty, than the conception of the rights of the parties by the lower court, as this is shown in the commissioner's findings which were apparently approved by the district judge. That report does not even refer to the cost of repairing the ship, *the crucial finding* in such a case. So far as the report is concerned, we must assume that the mere sinking of a valuable steamer on a river mud bank or sand bar at a point near two large cities *of itself constitutes a total loss of the vessel,* notwithstanding the fact that her owner, within two days after the accident, had ascertained from a responsible wrecker that she could be raised and that the wrecker would undertake the work, agreeing to deliver the vessel at Stockton or San Francisco for $5,000. "No cure, no pay" (Whitelaw, Vol. 2, p. 290). The wrecker's judgment was that the work would take 10 or 15 days (291). The shipowner's answer was that the charge

"was *too high,* that he thought he could do it for less money" (291).

"He said it was a very easy job and he said: *'Your price is exorbitant; it wouldn't take you but a few days'* " (p. 297).

Several months later, the owner raised the vessel at a total cost up to that time of $5,500.

No evidence was offered to show an effort to repair the vessel, or to show that *a single inquiry* had been made as to what such repair would cost. Yet, one witness testified that the owner had been advised that he must raise the vessel (308).

In the eye of the law, *it is a fraud* if the shipowner attempts to get more money from a claim of damage to his ship than is necessary to make him whole. It is a fraud if the shipowner seeks to make a total loss out of what is a partial loss. The burthen is placed on him, as a matter of public policy, as well as common justice, to show that he is not seeking this undue advantage. The commissioner in the court below does not seem to have had this rule in mind. *His report does not mention the question of repair.* The court, in overruling the exceptions to the court, seems to have expressly coincided with the commissioner.

The *new* rule thus established by the District Court is that if a vessel should be submerged as the result of a collision and afterwards raised at a small cost, she may be sold to the first comer and the owner, after deducting the cost of raising the vessel, may recover from the offending ship the difference between the remainder so

found and the first cost of the vessel, less an allowance for deterioration. It utterly ignores the element of cost of repair,—the first rule, and where repair is impossible practically, the second rule which makes the market value the measure of loss.

Now, by assuming the commissioner's rule to be the true one and his computation of damage correct, counsel reaches the conclusion that the legal value of the sunken steamer was the difference between the price she brought on sale and the cost of raising her, that is, $4,000, whereupon with that fact "determined", he finds it easy to reach the conclusion that practically and within the meaning of the rule applicable to cases of extraordinary cost of repair, the ship was a total loss (Brief, p. 15). It is clear that he begs the question. The very object of the rule is to prevent ascertainment of the damaged value by means which the law says are not a fair criterion of value, i. e., *by a sale of the wreck.* The rule which imposes on the claimant the duty to repair, unless he can prove that the damaged ship is not worth repairing, in which case he may sell, is not observed by making a sale and then offering the result as evidence that she could not have been repaired!

Again, the lower court ignored the rule that when a sale is justifiably made within the rule, i. e., when repairs cannot be made except at a cost greater than the value of the repaired vessel, the damage to the claimant must be based on the ship's *market value* at the time of the injury. The finding of value in the case at bar was made on the ship's *cost*, lessened by probable deterioration. If the ship was at the time running in a disastrous

competition with other vessels, it is not only clear that her value in the market would be much less than her cost, but it is, also, clear that her owner would be moved by every consideration of self-interest *not to repair*. Nor is it, as counsel for appellee claims, an answer to the demand of the rule to say that the shipowner was justified in not repairing, because his opponent in a litigated question as to the responsibility for the damage, declined to convict himself of fault in advance, and to do the repairing for him.

There can be no doubt of the true rule in such a case as is now before the court. There is no doubt whatever that the shipowner intended to throw upon the other party as great a loss as he possibly could and by a like amount to better his own condition. There is no doubt that he recognized that he was under an obligation to raise the ship and that in a bungling, damage-making way he did so after months of delay, but there he stopped. Counsel produced no evidence of any effort to ascertain the cost of repair. *Our side* showed that a man had been sent by the owner to determine the cost of repair in some form, but after communication of the figures by the latter to Mr. Frank, and when we called him to testify, he quite lost his memory on the subject and Mr. Frank, whose papers were burned in the great fire, did not offer to state the figures taken down by him or state that his memory also failed him. The witness was Grant, a shipwright, who had known the "Dauntless" from the time she was built and had done the carpenter work whenever repairs were necessary on her (Grant, 437). He testified that the ship had never had

" any big overhauling; she always had the necessary re-
" pairs" (437); that her value before the collision was $25,000 or $30,000, the latter an outside figure; that judging from the condition in which the "Dauntless" was kept, she being about 10 years old, the depreciation in her value was about 50 per cent (444); that if the owners could have got her on the ways, *it could not have cost much to repair her* (446); that the hull was only slightly injured by the collision; that the main damage was done by the attempts at salving her (446); that he examined the injured vessel, made an estimate of her repairs and that Mr. Frank had the figures; he did not then know what they were (438). On cross-examination he said that his estimate of the ship's value did not include her furnishings. As to the figures he gave to Mr. Frank, he had "no idea", but he did recall having recently said they were about $8,000—"to repair the hole"; this meant all the damage "caused by the hole" (464).

The commissioner remarked that the witness "seems
" very reluctant to state anything. He seems afraid to
" testify, unless it is because he wants to be absolutely
" exact" (466).

Finally, the witness admitted that his "part of the
" work, the shipwright work on the steamer, to straight-
" en the steamer up, that is, put her on the ways and
" put her back into shape" would cost $8000 (466).

On our part we made every effort to prove the cost of repair. The other side refrained from calling the one man who had at their request, examined and re-

ported on the cost of repairs. They had not seen him for years. When we tried to prove by another witness what the cost of making a new Texas deck would be, *counsel objected and the commissioner sustained the objection* (469).

Under such circumstances, we think that counsel was not justified in saying in his brief: "it was as much in " the power of appellant to supply evidence of the prob- " able cost of repairs, as in that of appellee" (Brief 38). We did what we could. He failed to do anything except stand in the way of our obtaining the facts. He makes a feature in his argument of the Texas deck and its value, while the commissioner values it, with the furnishings, at $15,000, all on evidence, as he says "not " wholly satisfactory of various witnesses not wholly " equipped to testify thereto" (211), yet on the suggestion and objection of Mr. Frank, rules out what would be satisfactory evidence, viz.: the statement of a witness concerning the actual cost of a Texas deck on a similar vessel.

The intention to keep out all evidence tending to show the real damage is manifest from the record. The intention on the part of the shipowner to *make* a total loss is equally manifest. By his conduct, he has made what might have been a comparatively insignificant loss, a very heavy one at the best. It would be unjust to charge us $8,000 for the damage to the hull in view of the fact that the ship was during four months exposed to all kinds of "malpractice" in an effort to lift her, when a competent wrecker had offered to raise her for

$5000 within ten days and deliver her at San Francisco or Stockton and to waive all claim for his labors, if he should fail. The machinery was not injured, as the purchaser testifies. So that, whether the ship in good condition was worth $30,000 or $50,000, it is clear that the cost of repair, if a fair effort had been made in due time to lift her, would have been comparatively insignificant. It is eight years since the collision. Counsel asks for leave to introduce further evidence, if the court should hold with us on the rule of damages. He has no evidence now of cost of repair, unless it was something intentionally held back on the trial by his client. If that be the fact, he is not entitled to the privilege for which he asks. That he has no such evidence appears from his brief when he says that proof of the kind could be had "only by the guesses of experts". But guesses of experts may be allowed to us who were not called on to make the repairs, while they are denied, under the doctrine of *The Catharine,* to the shipowner who knows that his first duty is to raise his ship and his next duty to repair her as cheaply as he can, provided always that the steamer after such repair shall be equally as available as before for his use.

We beg to remind the Court:

> "The rule of *restitutio in integrum* is a profitable one in almost any view of it to the owner of the injured vessel and ordinarily, on its fullest application, is not to be practically extended beyond what the necessity of the case requires."
>
> *The Providence,* 98 F. R. 137 (C. C. A.).

We submit that the decree should be reversed and that one should be ordered giving to the appellee a proportion of the sum expended in raising the vessel and a proportion of the $8000, as may seem just to the court.

Respectfully submitted,

CHARLES PAGE,
EDWARD J. MCCUTCHEN,
SAMUEL KNIGHT,
Proctors for Appellant.

No. 1769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Petitioner,

Appellant,

vs.

THE UNION TRANSPORTATION COMPANY (a corporation), THE PETER MUSTO COMPANY and R. L. SCOTT, Claimants,

Appellees.

In the Matter of the Petition of The California Navigation & Improvement Company (a corporation), Owner of the Steamer "Mary Garrett", for Limitation of Liability.

APPELLEES' REPLY BRIEF.

NATHAN H. FRANK,

Proctor for Appellee.

CAMPBELL, METSON & CAMPBELL,

Of Counsel.

Filed this.....day of January, 1910.

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Appellees' Reply Brief.

I.

THE LIMITATION SHOULD BE DENIED.

Appellant's reply seems to assume that our position on the above question is weak, because we have not

found it necessary to go into a long discussion in order to demonstrate our contention that the case was not a proper subject for the limitation of liability. He speaks of it as "the very meagre case made in opposition to the " limitation granted by the lower court" (p. 10).

To our mind the clearness with which the facts, upon which we rest our contention, stand out in the record, gives such strength to our position as to render anything but a "meagre" statement not only unnecessary, but absolutely out of place.

As already indicated, the facts are simple and undisputed.

In appellant's own language, when speaking of Glenn: " The whole case on the subject of the right to a limita- " tion can be found in the testimony of this witness. " * * * No one had a better opportunity of knowing " *the truth.*" If he had included the witness Pilot Rideout in the above statement, he would have presented the situation in its entirety.

And the fact that "no one had a better opportunity of " knowing the truth", renders the consideration of the other witnesses to which he refers unnecessary, for their testimony is of no value. These two men alone are testifying to actual conditions and actual facts *existing at the time of the collision,* while the others testify only to theories and deductions from matters observed on other occasions.

Neither will it do, as appellant now does, to suggest that these witnesses were in our employ at the time of testifying, for the record of their testimony is an abso-

lute refutation of that suggestion of unfairness. In fact it is on *their* testimony that appellant himself relies. Of one of those witnesses he says: "He demolished the en- " tire structure built by his *new employers* against the " appellant", etc. (p. 4). If so, appellant must at least give the witness credit for being honest and unbiased, in which view the suggestion about "his new employers", performs no proper office in the argument, and certainly cannot unfavorably affect his testimony.

Now, the *ultimate* facts to which those two witnesses testify are set forth in our original reply brief. For confirmation of this statement we rely upon the record. Appellant has not attempted to refute it, but only to qualify it by referring to other testimony. As to whether or no the facts to which we refer be the final result of the testimony, can only be determined by reading the record with our contention in mind, and, therefore, its further discussion will be of no avail.

The law applicable to those facts is so elementary that we have not deemed it necessary to refer to it. The attempt of appellant to relieve himself from liability because the vessel had passed inspection by the local inspectors, is somewhat startling to us, for if his contention were well founded, all the legislation on the subject, as well as all the machinery for its investigation might as well be abolished. There could never, in practice, be such a thing as the owner being privy to an unseaworthy condition, or improper officering, of his vessel. All he would have to do is to pass it up to the inspector who granted a license to the ship or officer, and there it ends. Neither is the language of this Court quoted from the

Annie Faxon, properly so construed. Appellant leaves out of his consideration, of that case, the fact that

> "The petitioner *not only deputed the general inspection of the vessel to a competent person,* but they had caused the boiler to be inspected by the local inspectors", etc. (p. 315).

The "competent person", above referred to, appears to have been

> "one De Huff, a marine engineer in the employment of the appellees who at the time of the inspection * * * accompanied the inspectors for the purpose of seeing what repairs they should require, if any. It appeared that De Huff was a competent marine engineer, and that he was licensed by the government. He testified that during the time the repairs were being made to the boiler in June, 1893, he visited the boat several times to note the progress of the work and to ascertain whether it was being done in accordance with his instructions. And he states that *he was inside the fire box at that time, and examined its condition carefully, and that he then reported to Capt. Pegram,* the port captain of the lessee company, then operating the boat, that it was necessary to put in a new mud ring. The repairs so recommended were made, and *he thereupon reported to Capt. Pegram that the boat was in good order and condition and ready for service.* The negligence which rendered the petitioners liable to the extent of the value of the boat, as found by the trial court, consisted in the fact that some one in the service of the petitioners continued to use the boiler after the boiler iron had become old and brittle from crystallization; there being evidence that its defective condition was made apparent from the fact that the iron broke under the hammering at the time of making the repairs referred to, and in the further fact that no inspection was made of the new mud ring that was inserted in June, 1893."

We submit that the facts of the case do not warrant the application, which appellant seeks to make, of the language quoted by him.

In view of the foregoing, we respectfully urge that the decree of limitation should be set aside.

II.

THE AMOUNT OF DAMAGES.

We have, in our original brief, treated this subject to our satisfaction. It only remains to answer the peculiar feature of appellant's reply. We regard with leniency the personal nature of that reply, because we recognize that appellant is urged to it by the extremity of his case.

The following excerpts carry the burden of his complaint:

"In the eye of the law, *it is a fraud* [italics his own] "if the ship-owner attempts to get more money from a "claim of damage to his ship than is necessary to make "him whole. It is a fraud if the ship-owner seeks to "make a total loss out of what is a partial loss" (Brief, p. 12).

"There is no doubt whatever that the ship-owner in- "tended to throw upon the other party as great a loss "as he possibly could and by a like amount to better his "own condition. There is no doubt that he recognized "that he was under an obligation to raise the ship, and "that in a bungling, damage-making way he did so after "months of delay, but there he stopped. *Counsel* "[our italics] produced no evidence of any effort to

" ascertain the cost of repair. *Our side* [his italics] " showed that a man had been sent by the owner to de- " termine the cost of repair in some form, but after " communication of the figures by the latter to Mr. " Frank, and when we called him to testify, he quite " lost his memory on the subject and Mr. Frank, whose " papers were burned in the great fire, did not offer to " state the figures taken down by him or state that his " memory also failed him. The witness was Grant, a " shipwright, who had known the 'Dauntless' from the " time she was built, and had done the carpenter work " whenever repairs were necessary on her. He testified " * * * that he examined the injured vessel, made " an estimate of her repairs and that Mr. Frank had the " figures; he did not know what they were" (Brief, pp. 14 & 15).

" On our part we made every effort to prove the cost " of repair. The other side refrained from calling the " one man who had, at their request, examined and re- " ported on the cost of repair. *They had not seen him* " *for years"* [our italics] (pp. 15-16).

" The intention to keep out all evidence tending to " show the real damage is manifest from the record. " The intention on the part of the shipowner to *make* a " total loss is equally manifest" (p. 16).

The foregoing assertions are pitiful in the face of the testimony which is supposed to give them occasion, and serve only to demonstrate the frivolous nature of this appeal, for it is on that testimony that appellant bases his contention for a reduction of the award to $8,000.

The only answer necessary is a request that the Court read that testimony with the above charges in mind. The testimony of Grant is found on pages 436 to 468. In the same connection, we ask that the testimony of Mr. Frank and Mrs. Gillis (both called by appellant), on pages 427 to 430, be read; also Mrs. Gillis, p. 281.

For the present we content ourselves with two short excerpts:

"Q. Did you tell Mr. C. D. Clark of the California "Navigation and Improvement Company recently that "the figure you gave was about $8,000?

"A. I didn't tell him that was the figure I gave; I "told him I thought it was somewhere around there, "that was all.

"Q. Somewhere around $8,000?

"A. Yes, but I am not sure.

"Q. But you told that to Mr. Clark recently?

"A. Yes, to repair the hole.

"Q. To repair the hole?

"A. Yes.

"Q. Didn't you tell Mr. Clark to repair the steamer?

"A. No, sir (p. 463).

* * * * * * * *

"Q. What did you mean to fix?

"A. I meant to fix the hole.

"Q. The one hole?

"A. The one hole.

"Q. Yes.

"A. Well, there was a lot of work to do to fix up the "hole—I am talking about the shipwright work, I do not "mean her cabins at all.

" Q. Well, was that the figure, $8,000?

" A. Somewhere around $8,000; I don't know whether " it was $8,000 or $10,000; it might have been more.

" Q. And might have been less?

" A. Might have been.

" Q. When did you give Mr. Frank those figures?

" A. When?

" Q. Yes.

" A. I don't know just how long a time ago.

" Q. How long ago—was it before the fire in San " Francisco?

" A. *Them figures was given shortly after she was " raised.*

" Q. But were they given to Mr. Frank, or were they " given to Mr. Gillis?

" A. I think Mr. Frank had them.

" Q. Did you give any figures to Mr. Gillis?

" A. No, sir.

" Q. You gave them to Mr. Frank?

" A. Yes—I think to Mr. Frank. I was down here " two or three different times; I could not tell you just " what times the figures were given.

" Q. Have you discussed this matter with Mr. Frank " recently?

" A. No, sir.

" Q. How long since you had a talk with Mr. Frank?

" A. Well, I couldn't tell you.

" Q. About how long?

" A. Some time before the fire.

" Q. Haven't you had a talk recently with Mr. Frank?

" A. No, sir.

" Q. Haven't you expected to be called here as a wit-
" ness by Mr. Frank?

" A. No, sir (pp. 464-465).

* * * * * * * *

" Mr. Frank. Q. Now, with reference to this $8,000.
" That was not an offer or a contract or anything?

" A. No, sir, it was just a rough estimate.

" Q. You came to my office and I took your state-
" ment and examined you as we are examining you now?

" A. Yes, sir.

" Q. At that time I asked you some questions about
" the cost of doing that particular work?

" A. Yes, sir.

" Q. And that is the manner in which you replied, is
" that it?

" A. Yes, sir.

" The Commissioner. Q. That is not based upon any
" estimate or any measurements taken or anything of
" that sort?

" A. No, sir.

" Q. Just a rough guess?

" A. That is it.

" Mr. Levinsky. Q. It is a rough guess now?

" A. Yes" (p. 468).

Such is the nature of the evidence we are accused of failing to produce. In our examination into the facts of our case, we called upon many persons and examined them to determine if they had any knowledge of the subject, and if so, if it was sufficiently accurate to warrant us in offering their testimony. Grant was tested out in

that way. He made a "rough guess", which, had we offered it, would have been objected to by *appellant* and ruled out as worthless. Many years afterwards appellant runs across this man, who relates the circumstances of his interview with appellee's counsel. The "mare's-nest" is brought into Court, and strenuously urged as an evidence of our duplicity—that, too, in face of the fact that instead of this man's incompetent testimony, and before he was produced, the record already contained the testimony of one of appellee's witnesses on the same subject—the very repairs concerning which Grant was asked—but whose testimony was based on the *actual expenditure made.* That fact was pointedly called to appellant's attention in the lower Court, and was again called to his attention in our brief heretofore filed herein. We refer to the testimony of E. V. Rideout on pages 219, 220 of the Record, and our former brief, p. 16.

We need no better defense than the foregoing record; and we need no better evidence of the frivolity of this appeal, than the necessity of such a contention for its foundation.

One word further, on the proof of the "*market value* at the time of the injury".

It is urged that,

> "when repairs cannot be made except at a cost greater than the value of the repaired vessel, the damage to the claimant must be based on the ship's *market value* at the time of the injury. The finding of value in the case at bar was made on the ship's *cost*, lessened by probable deterioration. If the ship was at the time running in a disastrous competition with other vessels, it is not only clear that her value

> in the market would be much less than her cost, but it is, also, clear that her owner would be moved by every consideration of self-interest *not to repair.*"

Now her "market value" is best determined by an actual sale. But it is evident that such a sale of the vessel herself *in sound condition* "at the time of the injury" cannot be had. An actual sale of a sister ship, *at the time of sale "running in a disastrous competition " with other vessels",* together with the testimony of a conceded expert who had the experience of the cost of placing said sister ship in the same condition as the "Dauntless" was "at the time of the injury", ought to be satisfactory evidence of that market value. This evidence, and its effect, we have pointed out in our original Brief, pp. 10 to 13. From that it appears that her *market value* "at the time of the injury" was *at least $60,000,* which amount we think the Commissioner should have found in our favor. We find no answer to this in the reply brief. Neither is there anything upon the subject in the opening brief, except the contention that the testimony of their alleged experts (which in our former Brief, p. 12, we have shown is, under the law, *not testimony at all*) should have been accepted in preference to Mr. Anderson's. (Appellant's Brief, pp. 34 to 37.)

With *the record* of her market value in that position, how can appellant expect his above quoted contention to carry weight?

In another phase of that argument we would inquire also, Where does appellant find authority in the law for the statement that "a sale of the wreck" is "not a fair criterion" "of the damaged value"? (See Reply Brief, p. 13.) We are entitled to his citation. His assertion alone, independent of both the reports and the record, will not answer as authority for either the law or the facts.

Respectfully submitted,

NATHAN H. FRANK,
Proctor for Appellee.

CAMPBELL, METSON & CAMPBELL,
Of Counsel.

No. 1769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Petitioner, *Appellant,*

vs.

THE UNION TRANSPORTATION COMPANY (a corporation), THE PETER MUSTO COMPANY and R. L. SCOTT, Claimants, *Appellees.*

In the Matter of the Petition of THE CALIFORNIA NAVIGATION & IMPROVEMENT COMPANY (a corporation), Owner of the Steamer "MARY GARRATT", for Limitation of Liability.

PETITION FOR REHEARING ON BEHALF OF APPELLEES.

NATHAN H. FRANK,
Proctor for Appellees.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

In this petition we discuss the following propositions:

I.

The Court Erred on Questions of Fact:

1. The proof does *not* show rough handling in raising the vessel, nor damage therefrom.
2. The proof does *not* show any lack of skill in the operation of raising.
3. The proof does *not* show any negligence in care of vessel between time of raising and time of sale.
4. The proof does *not* show any damage to vessel during that period.
5. The proof does *not* show that Whitelaw could have raised the vessel either quicker or with less damage.
6. The proof *does* show that competent and skillful men were at work on her during the whole time of raising.
7. The proof *does* show that she was raised in the best method known to the business.
8. The proof *does* show that both Whitelaw's men and appliances were used on her during nearly the whole period.

II.

The Court Erred in Matter of Law:

1. The Court held that because *both parties did not appeal,* the interlocutory decree was final. That is discussed under heading III.
2. The Court held that the damages were to be ascertained by the difference in value before collision and her condition *after sinking and before any expenditure for her raising:* which is manifestly wrong.
3. The Court held that the *onus probandi* of the *defensive matter* was on the Dauntless. This we consider a fatal error, and is discussed under heading II. It results in placing a premium upon the fight of petitioner for *time* during which death took our principal witness.
4. The Court disregarded the settled rule respecting findings of fact, without justification in the evidence.

On these points the testimony is analyzed and fully set forth in this petition, to which we respectfully solicit the careful attention of the Court.

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PETITION FOR REHEARING ON BEHALF OF APPELLEES.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In pressing for this rehearing we do not overlook the practice of the court to grant such relief sparingly, nor

do we ignore the presumption that very properly rests in the mind of the court in favor of its opinions once rendered.

However, with the greatest deference to the court, the nature of that opinion makes us feel that perhaps our urgency for an early decision of this matter may have deprived us of the benefit of that mature consideration of the case which it would otherwise have received at the hands of the court, and we have confidence that the court will not hesitate to grant the relief if we can convince it that that opinion is founded upon *a misunderstanding of the facts* of the case—which we are convinced it is. This conviction does not rest upon our individual judgment. Though we hope to point out to the court the testimony justifying the above statement, some weight must also be allowed to the two separate previous inquiries into the facts, by the Commissioner and the District Court, which inquiries were made under somewhat more favorable circumstances than at this hearing, in that *there* the facts regarding the nature of the damage were discussed at much greater detail. This suggestion is not original with us, but follows the settled rule so frequently announced both by this court and by the Supreme Court, and carries with it a presumption at least equal to the one above referred to. Why that rule was not regarded in the present case does not appear from the opinion.

I.

THE OPINION DOES NOT HOLD THAT THE COMMISSIONER AND THE DISTRICT COURT ERRED IN THE LAW OR RULE BY WHICH THE DAMAGES ARE TO BE ASCERTAINED.

On the contrary, it distinctly and expressly adopts and commends the rule, for ascertaining the damages, *under which the Commissioner proceeded.* It only criticizes the Commissioner's finding because of a difference between this court and the lower court in *their respective understanding of the facts.* Upon that subject this court says:

> "As at present advised the Court holds that the only way in which the damages may be liquidated consonant with equity will be by allowing to the owner of the injured vessel a sum as nearly as can be ascertained *equal to the difference in her* VALUE *before the collision and in her condition after sinking* and before any expenditure for raising her had been made. *This is apparently what the commissioner endeavored to do,* but his award is certainly erroneous because not based upon proof of *all the essential facts.* It is obviously unfair to accept the price which the vessel was sold for at private sale *after further deterioration by rough usage in raising her and for want of care during a long period of time* as the criterion for judging her value at the time when the liability of the petitioner became fixed. To ascertain the *difference between the values* in the different conditions of the vessels, both factors must be given, so that the lesser may be subtracted from the greater. To render a just decision the court should be informed by evidence as to her value or condition in the situation in which she was immediately after the collision, and the reasonable cost of her restoration. We do not find in the record any competent evidence covering this ground", etc.

The foregoing is the final word of the court upon the subject of the rule by which the damages are to be ascertained, and, in fact, it is *the direction of this court to the owner of the "Dauntless" as to the manner in which he is to proceed* in order to supply the additional evidence which he is to be allowed to take. It is thus plain that the lower court made no mistake respecting the law, viz.: that the damages are to be measured by the *value of* the sound vessel as compared with the *value* of the damaged vessel.

As already said, the opinion expressly recognizes that the rule adopted by the Commissioner is the rule which this court now lays down for that purpose, but it is suggested that the lower court *erred in its conception of the facts* which proved those two values. The particular facts which the lower court is supposed not to have given their proper weight, are those relating to the contention that additional damage, for which the petitioner should not be held liable, accrued to the vessel after her sinking, *by rough usage in attempting to salve her,* and *by want of proper care between the time of salving and her sale.*

Some criticism is also suggested of the private sale, as evidence of value. This we will notice later.

The foregoing is the substance of the decision of this court, and in it there is conclusive evidence that this court has been misled with respect to those particular facts. When the court concludes that the vessel suffered "further deterioration by rough usage in raising her, "and for want of proper care during a long period of

" time", it is certain that the evidence upon the subject has been overlooked. Sure it is, that that subject was earnestly and fiercely contested by the petitioner both before the Commissioner and before the District Court; that the evidence, when properly considered, does *not* show any damage by rough usage in the salving of the vessel; on the contrary that accusation was unquestionably shown to be without foundation. Further, the evidence does not prove any deterioration from want of care between the time of her raising and her sale; that statement has no foundation except the suggestion and brief of appellant's counsel. In this statement we do not ignore the testimony of Rideout and Tucker referred to in the opinion, to which we shall refer again.

In the same connection we urge upon the court the departure in this case from what is the settled rule that, in a case of conflicting testimony

> "the question is not what the conclusion of this Court should be on the testimony, but whether the Commissioner's report, sustained as it was after full argument by the District Court, was so clearly erroneous as to warrant us in setting it aside." The La Borcoigne, 144 Fed. 783.

Unless that rule be consistently observed, litigation, depending upon questions of fact, assumes an element of chance which destroys its usefulness as a means of administering justice. This is so because the successive submissions of such a question to successive judges, under somewhat varying conditions, and the natural difference in the views and the impressions that men receive, introduce into the final outcome of the litigation, too

much that is accidental in its nature. Disappointed litigants, upon questions of fact, may therefore well reason that these elements, as well as time, will work to their advantage. Hence the wisdom and justice of the rule above quoted, upon which rule this court has repeatedly acted. Last Chance Mining Co. v. Bunker Hill Mining Co., 131 Fed. 587-8.

In saying this, we recognize the facility with which distinctions, more or less satisfactory, may be made in individual cases as a ground for disregarding such a rule, but we confidently assert that no satisfactory showing can be made in the present case for so doing, and the foregoing opinion does not suggest such a distinction.

We hope to justify the foregoing assertions with a detail of the testimony from the record, to which we earnestly hope the court will give attention.

II.

DAMAGES BY ROUGH USAGE IN SALVING IS DEFENSIVE MATTER.—ONUS PROBANDI IS ON "MARY GARRATT".—IF THE PROOF IS UNCERTAIN OR OTHERWISE UNSATISFACTORY THE JUDGMENT OF DISTRICT COURT IS RIGHT.

We quite as earnestly urge, upon the court, the law applicable to the question of damage by rough usage in her salving, viz.: that *the wrongdoer, who is liable for the original damage, is liable for such additional damage,* "unless it can be shown by *clear and positive evi-*" *dence* that any part of the subsequent damage arose " from *gross* negligence or *great want of skill*". That is

the language of no less authority than Dr. Lushington, and is recognized as the rule. The Pensher, Swabey Adm. 211, 213. It was there said:

> "It is admitted that the Pensher is to blame for the collision, and the consequence of this is, that all the damage arising from the collision must be borne by the Pensher, unless it can be shown *by clear and positive evidence* that any part of the substantive damage arose from *gross* negligence or *great* want of skill on the part of those on board of the vessel damaged."

That there is no *such* evidence in the record, it will also be our purpose to show in the detail that follows.

That position, too, is in full accord with the decision of this court in The Rickmers with respect "to the gen- "eral rule that damages which are uncertain, contingent "or speculative, cannot be recovered". That rule is elementary and well settled, but its true application to the facts of this case *is just the reverse of that made by the court.* The "Dauntless" has proved her gross damages, which are not "uncertain, contingent or speculative". The question of a deduction from those gross damages for increase by rough usage, etc., *is defensive matter*—that is, it is an affirmative defense which must be made out by the defendant *in the same manner as the original case must be made out by the libelants.* In other words, the defendant, in asserting that the vessel has suffered additional damage by rough usage in her salvage, or by want of care after her raising, is, in his proof of such additional damage, also "subject to the

general rule'' above referred to. In the language of The Rickmers therefore:

> ''There is uncertainty when the nature of the [alleged additional] damage cannot be determined. It follows that * * * the nature of such damage must be clearly established, and not left to speculation or uncertainty.''

This is in strict accord with, and illustrates the language of Lushington above referred to, that the evidence on the part of the wrongdoer, to establish this affirmative defense, ''must be clear and positive''.

That the burden of proving such additional damage is on the ''Mary Garratt'' and not on the ''Dauntless'', is settled law. Dr. Lushington repeated the effect of his ruling in The Pensher in The Mellona, 3 W. Rob. 713, where the principle was laid down that *there is a prima facie presumption respecting such damage in* FAVOR OF THE LIBELANT.

The rule is general.

As stated in the case of Cornwall v. Moore, 132 Fed. 870:

> ''This rule, in so far as it provides for the mitigation of damages in an action of this character, is based upon the principle, that if a party entitled to the benefit of a contract, can with reasonable exertions protect himself from loss arising from a breach, it is his legal duty to do so. Heckscher v. McCrea, 24 Wend. 304. *But in the application of this rule the law imposes upon a defendant guilty of a breach of contract the burden of proving in mitigation of damages,* that the other party could with reasonable diligence have reduced or prevented the damage occasioned by such breach.''

In Hamilton v. McPherson, 28 N. Y. 75, the court said:

> "The law, for wise reasons, imposes upon a party subject to injury from a breach of contract, the active duty of making reasonable exertions to render the injury as light as possible.
>
> * * * * * * *
>
> *"The burden of proving that the damages which have been sustained in such cases could have been prevented, unquestionably rests upon the party guilty of the breach of contract."*

In Costigan v. Mohawk & H. R. R. Co., 2 Denio 609, the court, speaking of a defense looking to the reduction of damages, said:

> "But first of all the defense set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should, therefore, prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas, the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is a wrongdoer, and presumptions, between him and the person wronged, should be made in favor of the latter. For this reason, therefore, the *onus must in all such cases be upon the defendant."*

Sedgwick, in his work on Damages, Vol. 1, sec. 227, after premising that

> "it has been repeatedly held that the burden of proof is always on the defendant to prove that the plaintiff might have reduced the damages",

quotes the foregoing from Costigan v. Mohawk & H. R. R. Co. in the body of his work.

That the rule, of which this burden of proof is a corollary, is not affected by the question of contract or tort is also affirmed by Sedgwick,

> Sec. 205: "The rule applies both in contract and in tort, and *illustrations may be drawn from every branch of the law*",

and again in Sec. 214, the same author says:

> "The rule is of frequent application in actions for personal injury. In all such cases, as well as in actions for injury to animals, the party injured will in the exercise of ordinary prudence, take reasonable precautions to avoid the consequences of the injury, by the employment of medical aid, etc. Where he omits to take such steps, he cannot recover for the consequences which come from his own omission."

In a general way also, we regard the language of the Supreme Court in the case of The Ludwig Holberg, 157 U. S. 60, as applicable to this question, though in that case the language was used with reference to the question of liability and not to that of the reduction of damage. The language is as follows:

> " 'Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.' The usual effort is made in this case to impeach the findings of the circuit court, but libelant at best has only succeeded in raising a doubt, which is not sufficient. If there be any evidence to support the findings, as there undoubtedly is, they should not be disturbed."

While, therefore, we do not take issue with the statement in the decision we are reviewing that "in this connection it is to be observed that the *onus probandi* "rests upon the party demanding compensation to "prove his loss and the facts necessary to be ascer- "tained and considered by the court in fixing the defi- "nite sums to be awarded", we *do take issue* with *the application* of that principle against the "Dauntless" on this *affirmative defense* of the "Mary Garratt" respecting the alleged damage by rough usage in salving the vessel, and want of care after raising. *On those questions, the onus probandi rests upon the "Mary Garratt" and the application of the principle is reversed.*

This we consider a fatal error in the opinion, because, if the *onus probandi* is misplaced by the opinion—if its application should be reversed so as to fall upon the "Mary Garratt" instead of on the "Dauntless", the proofs remaining the same, *the conclusion must be reversed.*

Without, therefore, the necessity of considering the evidence anew, the very ground upon which this court has reversed the decision of the District Court, is the ground for the affirmance of that decision.

III.

LACK OF A SEPARATE APPEAL.

Before taking up the consideration of the evidence, it is proper to call attention to another part of the opinion, which we deem clearly erroneous, namely: that part

which ignores our contention respecting the limitation of liability, upon the ground that *we have not entered a separate appeal* in this cause. The opinion reads:

> "*The owner of the 'Dauntless' has not appealed* and the appellant does not now dispute the correctness of that part of the District Court's decision which fixed the responsibility for the collision upon the officers and crew of the 'Mary Garratt'. Therefore, the interlocutory decree *stands as a final adjudication of two controversies* and *the appeal brings to this court for decision* ONLY the remaining question as to the amount of damages which the owner of the 'Dauntless' is lawfully entitled to recover."

The error of that statement requires no argument in this court, where the reverse proposition has been definitely settled. The fact that "the owner of the 'Dauntless' has not appealed" does not deprive him of the right, upon the appeal, to a review of the questions decided against him in the lower court. In our principal brief we raised the point that the interlocutory decree was erroneous in so far as it granted a limitation of liability, and to that extent should be modified (see Point II, Brief, pp. 3 to 8). The opinion now under consideration indicates that that discussion in our brief was overlooked. Certainly the above language is not in accord with what this court said in THE SAN RAFAEL, 141 Fed. 275, viz.:

> "It is well settled, said the Supreme Court in Irvine v. The Hesper, 122 U. S. 256, 266, 7 Sup. Ct. 1177, 30 L. Ed. 1175, 'that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court. Yea-

ton v. United States, 5 Cranch. 281, 3 L. Ed. 101; Anonymous, 1 Gall. 22, Fed. Cas. No. 444; The Roarer, 1 Blatchf. 1, Fed. Cas. No. 11,876; The Saratoga v. 438 Bales of Cotton, 1 Woods 75, Fed. Cas. No. 12,356; The Lucille, 19 Wall. 73, 22 L. Ed. 64; The Charles Morgan, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed they did so in view of the rule, and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants'. The same rule applies here, since this court now has the jurisdiction of appeals in admiralty from the District Court that formerly appertained to the Circuit Court. The Sirius, 54 Fed. 188, 194; 4 C. C. A. 273. The whole of the cases in hand, therefore, were opened by the appeals taken by the petitioner and claimants. It is unimportant that no appeal was taken by McCue, or by the guardian of the widow and child of Alexander Hall, and we must make such disposition of the cases as the records before us show to be proper."

IV.

THE MEASURE OF DAMAGE PROPOSED BY THIS COURT IS WRONG, VIZ.: THE DIFFERENCE IN HER VALUE BEFORE COLLISION AND HER CONDITION AFTER SINKING AND BEFORE ANY EXPENDITURE FOR RAISING HER.

It must be admitted that a *sunken* vessel has no value except her value *when floated* less *the cost of floating her*. Hence, the rule now suggested by the court, namely, to allow "to the owner of the injured vessel a " sum as nearly as can be ascertained equal to the differ-

"ence in her *value before collision,* and her *condition* "*after sinking and before any expenditure* for her rais- "ing had been made", would not be right;

First, because it does not allow the injured vessel the expense of raising, to which all must agree she is entitled;

Second, because it does not allow for a change of condition,—that is, further damage to the hull which is *the result of the ordinary methods of raising her.* That is a natural consequence of the wrongful act for which the injured party is entitled to be compensated. Sunk, she is of no value. She must be raised to say what value there is in her, and, *if her condition be necessarily changed in the operation of raising her,* her condition when raised is the only value saved. Such additional injury is in reality an expense of raising. The rule laid down by the court cannot, therefore, be otherwise than erroneous.

V.

THE TESTIMONY.

With these suggestions in view, let us now examine the testimony on the question of additional damage, and unskilfulness in the methods employed in raising her, and compare it with the findings of this court.

The views of this court upon the question of damage in raising, and subsequent want of care, finds its ex-

pression in the following language. Referring to the time of her sale:

> "She was then in a dilapidated condition; she was waterlogged; her upper decks and cabin were gone; her hog chains and smoke-stacks were gone, and her hull was bulged up in the middle. In his testimony the man who made the purchase said:
>
> Q. She had been repaired and was then in Stockton?
>
> A. No, sir, not repaired. She had been floated and brought to Stockton. Her hull was full of water when I bought her.
>
> * * * * * * *
>
> Mr. FRANK. Q. You had to reset the machinery, repair it, and clean it up?
>
> A. Yes, sir, we had to lift the wheel out; in fact the wheel was mostly all gone—the buckets gone. We had the wheel hanging on a crane while we put the boat in dock to try and get her straightened up. The center of the boat had come in such a shape was one reason that we got her so cheap. In the judgment of most of the steamboat men I talked to, we would never be able to get her back to shape, because the middle of her had come up in the middle, and the hog chains were all gone.
>
> Mr. Tucker, a witness called in behalf of the owner of the 'Dauntless' testified that after being floated the boat was pumped dry and that she was not hogged when she was delivered at Stockton; and there in *uncontradicted evidence* proving that the hull was weakened by loosening or removing the hog chains while the work of raising the vessel was progressing. Consideration of all the evidence necessarily leads to the conclusion that there must have been considerable diminution of value of the vessel by reason of deterioration during the period of eight months preceding the sale."

That is premised by the following:

> "From the evidence appears that the owner of the 'Dauntless' declined to accept the offer made by a competent contractor to raise the steamboat promptly and deliver her at either San Francisco or Stockton for the gross sum of five thousand dollars, and instead of that by intermittent efforts, under the direction of several superintendents, successively, without efficient apparatus and power, the boat was raised and delivered at Stockton four months after the collision."

It will be apparent that neither the length of time nor the inefficiency of the apparatus, nor the intermittent nature of the efforts, cut any figure in this matter, unless one or more of them resulted in damage to the vessel greater than she would have suffered had she been raised by the competent contractor.

The first question, therefore, to which we should direct our attention, is, how would this competent contractor have proceeded to raise her? What damage would she have suffered at his hands? With that we should compare the method in which she was raised, and the damage she suffered thereby.

As intimately connected with that inquiry, if this court deems that the time employed in raising her affects the question, we will examine into the evidence to ascertain if this competent contractor could have given any assurance of performing the work in a less time.

So, also, with reference to his alleged superior competency we shall inquire whether he would not have em-

ployed *the very men,* as well as *the very means,* that were in fact employed upon the work.

Turning to Whitelaw's testimony we find the following as,

WHITELAW'S METHOD OF RAISING HER.

"The first thing we do when we take hold of a wreck is to take in the conditions surrounding the wreck; *the feasibility of carrying her from where she is to a point where we can get the main decks above water.* We generally canvas them and batten them up *to keep the mud from getting in,* because the precipitation of the river is very rapid, and it does not take long to accumulate a weight that is greater than the ship herself, that is, the precipitation of mud is so great in the river."

(p. 292.)

"My *intention,* if I had had the contract, was to patch up the break that was in her, canvas her over and pump her out.

Q. Did that require special appliances?

A. No, sir, not in the way that we handle most of them. *Once in a while we have to put some timbers across to put chains underneath.* If the break is so great that we cannot get at it to patch it, sometimes underneath the bottom may be that she is resting on the break so that the divers cannot get to it.

Q. What is *the danger of delay* in raising a vessel that is sunk in a river like the San Joaquin?

A. Well, in either the San Joaquin or the Sacramento, as I tell you, *the precipitation is the greatest danger—the accumulation of sand inside of her.*"

(p. 293.)

"Q. What is the danger *from these accumulations,* what effect do they have on the bottom? [vessel?]

A. No effect until you come to lift her. If it is necessary to use chains, providing you could not stop the holes and pump her out, *the weight* becomes so much greater that you are liable to pull the vessel to pieces in getting her out.

Q. You are liable to hog her, as they call it?

A. Yes, sir, it would be the same as hogging. All flat vessels, if you displace any of the hog chains, she will hog herself, and the chains will break."

(p. 294.)

* * * * * * *

"Q. What would be the effect on the upper works of a vessel lying two or three months under water in that condition?

A. If it was not exposed to a choppy sea or a strong current, *it would not hurt her any.*

Q. The water logging would not affect her?

A. Not beyond starting the paint, and making the paint leave the wood."

(p. 294.)

* * * * * * *

"Q. Would the plan which you have described for raising the vessel involve mutilation of her upper works?

A. Well, not the houses particularly; *possibly we might have to cut four openings into it to run timbers through.* As a rule all those stern-wheel steamers, the houses are all on the upper deck and *in the freight space was where these timbers would go across.*

Q. So that the vessel would have been practically, if raised in that fashion, intact except for the hole made by the collision?

A. Yes, sir, if she was taken rapidly and not leaving her to lay too long—go on at once and *cover her up so that the mud would not get into her.*

Q. *The mud would be the danger?*

A. *Yes, sir.*

Q. The longer she lies *the greater the accumulation of mud?*

A. Certainly.

Q. And therefore the *consequent injury in raising her?*

A. Yes, sir."

(p. 295.)

"Q. *You made no personal examination of the condition of the vessel?*

A. *No, sir, I did not.*

* * * * * * *

Q. *You do not know, as a matter of fact that her stanchions had been pulled out before this time?*

A. The stanchions had been pulled out?

Q. Yes, the support of her upper works. You did not know that? If that is a fact you did not know it?

A. I did not know it, no.

Q. Now, when you come to go to work on a proposition of that sort, I presume that the manner in which the vessel lies on the bottom, the condition of the current, and *whether or not she had* ALREADY *been hogged by her position on the bottom* would all be material things to be considered, would they not?

A. Certainly, if she was already hogged."

(p. 296.)

That testimony discloses the following facts:

1. That Mr. Whitelaw made no personal examination of the vessel upon which to base his opinion regarding her condition, or the best method of raising her. Tucker and Roach were both *employees of Whitelaw,* and both worked upon the raising of the vessel. We shall presently see, *at first hand,* what Tucker's views were as to *the best method* to be employed, as well as those of Robert Don, also so employed.

Since Mr. Whitelaw depends for his opinion upon report only, and would have looked to Tucker to carry out the operation, Mr. Whitelaw's testimony upon the subject, based on his second-hand information, can certainly be no better, and we leave it to the court to say if it can be *as good,* as the first-hand testimony of Tucker himself.

2. It further appears from this testimony that Mr. Whitelaw was *not certain* of the manner in which he would be compelled to proceed,—whether or not he would be compelled to adopt the means which were adopted, viz.: "to put timbers across, to put chains un- " derneath, *or* to patch up the break which was in her, " canvas her over and pump her out". He admits: " Possibly we might have to cut four openings into it " [the houses] to run timbers through. As a rule all " those stern-wheel steamers, the houses are all on the " upper deck, and in the freight space was where these " timbers would go."

We shall show that the means which he admits that he might be compelled to resort to, were the means actually adopted and had the approval of Whitelaw's man Tucker as the only practical means. We shall further show that those four openings were the only damage done to the houses by the method actually employed in raising her. The other damage was the result of the collision.

3. It next appears that, in his opinion, the only danger of *the delay* was the precipitation or accumula-

tion of sand in her, the effect of which would be to add to her weight, so that "if it is necessary to use chains, " provided you could not stop the holes and pump her " out", we would be liable to hog her; *that there was no danger to her upper works from this source.*

We shall show that the sand and mud was inconsiderable, and not enough to do her any injury. We shall further show that she was not injured in any of the operations of raising.

4. We shall show that Mr. Gillis' operations were, from the first, along the lines indicated as the best method, and that, in his operations, he did no injury to the hull.

5. We shall then give Mr. Arthur Robinson's version, with our comments.

METHOD BY WHICH SHE WAS RAISED.

(Testimony of William Tucker.) Pages 472-473.

"Q. How was she brought up to the surface? By what appliances?

A. We had two barges there, one on each side of her, and four sets of timbers across her, and wires leading underneath the wreck.

Q. How many wires did you have?

A. Four.

Q. How distributed?

A. They were equal distances apart, right fore and aft of the vessel. They were placed under her where it was supposed the most weight of the vessel would come on to them.

Q. How was the weight distributed on those wires?

A. Pretty evenly distributed.

Q. You say you had some timbers across from barge to barge?

A. Yes, sir, and the wires secured to the timbers. We used to sink the barges down and flood them with water within a foot of the deck. Right at the point of low water we used to tighten up on the wires, and then pump the barges out and left the tide do the rest of it. The tide would lift her and she would float up the river. We were directing her to a shallow bank by means of anchors and chains and guiding her on to the Santa Clara shoal; there was five feet of water there at low water.

Q. By repetition of this process at each tide you succeeded in getting her on these shoals?

A. Yes, sir.

Q. As she came up what did you do to the deck-houses as they rose up to those beams?

A. As the upper structure came in contact with the timbers we had to cut the housing down in order to allow the vessel to come up past the timbers.

Q. When you speak of cutting the houses down what do you mean, that you destroyed all the houses, or only cut down the width of the timbers?

A. We only cut down the width of the timbers; the houses were not in a very good condition when they came up. The stanchions underneath the fly-ing-deck were all carried away."

CANVASSING AND PUMPING OUT IMPRACTICABLE.

(Testimony of William Tucker.) Pages 475-476.

"Q. From your experience, Mr. Tucker, in this business, was there any other way in which she could have been raised?

A. I don't know of any other way right here on this coast; there are no appliances for raising ves-sels any different from what we undertook to raise her by.

Q. Supposing the vessel had been lying in a position where one end of her Texas deck was just

above the water, and the other end of her Texas deck was submerged below the water, could any other process than the one you have indicated have been used to raise her with any success, or economically?

A. It might have been possible to put coffer-dams around her, but it would have been quite an expense. She would have been so far under water that it would require lots of strain, and take them river boats, their boilers are not covered over, and there are hatches along the deck. It is a pretty hard proposition to cover them in from the main deck. I don't know how it would have been with the coffer-dams around her. I don't think I could have adopted that plan of raising her. *I believed the best plan was to put the wires and use the barges.*

Q. Leaving out of consideration the question of coffer-dams, *could you have canvassed over any portions of the openings of the vessel, and pumped her out in that condition?*

A. Not if she was so far submerged under water as that. The Texas deck, I understand, is the top of the housing?

Q. Yes.

A. *No, sir.*

Q. *That would not have been practical?*

A. *No, sir, not to have convassed over the holes.*"

BUILDING COFFER-DAMS INVOLVED TEARING AWAY HOUSES.

(Testimony of William Tucker.) Pages 478-479.

"Q. As I understand, with reference to vessels of this class, the arrangement of her main deck where her boiler is, and things of that sort, is such that *it would be impracticable in that depth of water to have canvassed them over and pumped her out?*

A. *Yes, sir.*

Q. Is this process of building a coffer-dam around her a very expensive proceeding?

A. In many cases you have to employ a force of divers and you have got to take extra precautions to get everything tight. You have to batten all the seams and cover them with canvas and use quite a lot of precautions in order to get the things tight so that your pumps will not have too much leakage to contend with.

Q. Does this process of the coffer-dam also involve the patching or closing up of the hole underneath the water where she was damaged?

A. Yes, sir.

Q. Is that a practical thing at that depth of water?

A. In 60 feet of water you can patch up a hole all right. I don't think I would undertake to build a coffer-dam in 60 feet in water.

Q. I am speaking of where she lay with one end of her Texas deck submerged, as I have already indicated?

A. I understand now. One end submerged and one end out of water.

Q. I mean the Texas deck.

A. I don't know whether it would be practicable or not. It just depends on the man who has got the job, whether he considers it would be the cheapest way to go about it, or put wires under her with barges. You do not take into consideration the housing work. They go to work and tear it down in a good many cases.

Q. *The building of a coffer-dam would involve the tearing away of the houses anyhow?*

A. *In a good many cases, yes.*"

GILLIS HAD BEEN WORKING ALONG THE SAME LINES.

Robert Don, who says he was employed by Mr. Gillis, is asked:

"Q. What did you do then?

A. Kind of looked around, done all I could to help Mr. Delaney for Mr. Gillis.

Q. Did Mr. Delaney subsequently give up the work?

A. They came there and tried to—We got lines to her and they came there with two steamers one night. Mr. Gillis was there and said they were going to try and pull her up the river with two steamers. After they hauled her a hundred yards the lines broke, and Mr. Gillis says, 'We will quit right now, and go to Stockton and let her be.' ''

(p. 317.)

From this the impression is given that she was being dragged over the bottom by main force. This is not the fact. The further testimony of this witness shows that she was being transported in the very manner Tucker afterwards employed and which he says was the best method.

Speaking of the place where they started to pull her from, he is asked:

''Q. What is the depth of the water there?

A. Fifty-four feet, that is the first time.''

(p. 318.)

* * * * * * *

''Q. I understood you the first time you attempted to pull her, she was in 54 feet of water?

A. Yes, sir.''

(p. 318.)

''Q. What depth of water was she in when you left her and started to pull her at that time?

A. About 40.

Q. Was she buoyed when you left her?

A. *She hung on the two barges, with lines on her.*

Q. Had she broken loose from those lines?

A. No, sir.

* * * * * * *

''Q. I understood you all left there.

A. The first time?
Q. Yes, that is what I am coming to.
A. The first time she was in about the same depth of water.
Q. When you left her?
A. Yes, sir.
Q. *Was she buoyed?*
A. *Yes, sir.*
Q. *How?*
A. *She had one chain on her, and two barges.*
Q. Had she broken that chain?
A. No, sir. That one chain was there. She had broken one chain, but there was still one chain fast to her.
(p. 319.)

Q. How deep was the water that the Dauntless was in the first time you went down there?
A. Fifty-four feet.
Q. This time when she was hauled this half a mile, that was by sheer force, by the steamers, was it not?
A. *No, sir.*
Q. How was it?
A. *Floating her on the barges.*
Q. *Lifting her up on the barges?*
A. Yes, sir.
Q. And then pulling the barges?
A. *And the tide drifted her up.*"
(p. 330.)

Robert Don (p. 327):

"Q. During the time that you were working on her you were allowed to adopt your own means, were you not?
A. Yes, sir.
Q. You considered them the best means that could be adopted under the circumstances?
A. Yes, sir. *That was the way she was raised. The way I started in.*

Q. *You considered that the best method that could have been employed for that purpose?*
A. *Yes, sir.*''

* * * * * * *

(p. 329):

''Q. Who succeeded you then?
A. A man named Roach.
Q. *Do you know if he continued with the same methods that you applied to it?*
A. *Yes, sir.*
Q. *And finally raised her?*
A. *Yes, sir.* If you want to, I will show you the photographs of her.''

MR. GILLIS HAD MEN AND APPLIANCES FROM WHITELAW AND FROM PETITIONER.

''Got appliances from Whitelaw.''—(Whitelaw, p. 289.)

''There was an old gentleman came to see me about getting her up. I think his name was Gillis —a tall, slim man.''

(p. 290.)

''Q. About what time was this that he came?
A. I think the vessel had been down then two or three days.

* * * * * * *

A. Mr. Gillis came down again to see me, and he asked me what I would charge to lift the vessel. I said I would charge $5,000, no cure no pay, and to deliver either in Stockton or in San Francisco.''

* * * * * * *

(p. 291):

''Q. And how long was this interview after the first interview?
A. I think it was two days; possibly it was three days.

* * * * * * *

A. I don't know that my memory is good enough to state. I think it would be *three weeks* later that he came and got some appliances from me.

Q. What did you give him at that time?

A. I gave him some pumps, and one of our divers went up there—I think it was Tucker.

Q. You furnished him pumps and men then?

A. Yes, sir.

Q. For raising the Dauntless?

A. Yes, sir."

The California Navigation and Improvement Company, the owner of the "Mary Garratt", furnished the steamer "McDonald" and two barges and the crew engaged in raising the "Dauntless". (p. 286.)

Q. In fact they did assist in raising the 'Dauntless', did they?

A. They furnished the equipment.

* * * * * * *

Q. Did they furnish everything that was used by Mr. Gillis for the purpose of salving that boat?

A. No, sir.

Q. What did he furnish?

A. He furnished men and materials to raise the 'Dauntless.'

Q. What materials?

A. Cables, and piles and timber."

(p. 287.)

THE MANNER GILLIS PROCEEDED DID NOT TEND TO INJURE VESSEL.

(Testimony of William Tucker.) Page 485.

"Q. This work and the manner in which they were doing it was tending to injure the vessel, tearing the woodwork apart?

A. I did not see that it was. The chains came underneath the bottom and landed on the barges

alongside of her. There were a couple of timbers in order to keep the barges in place. The chains came over the edge of the barges."

SEDIMENT DID NO DAMAGE.

(Testimony of William Tucker.) Page 489.

"Q. Did I understand you to say on your direct examination that the mud that was of any extra weight did not damage her any in bringing her up?

A. No, sir, it is a light sediment that floats around in that river. You cannot call it mud altogether. It is a kind of a brownish sediment. I think there was perhaps four or five inches of sediment stuck around her. It is not the same deposit that you get from the bay.

Q. That you washed out as she came up?

A. We used a hose and washed it out as it came up. There may have been a little left in when we took her to Stockton. Taking the hull of the vessel the amount of mud did not amount to anything."

(Testimony of William Tucker.) Pages 473-474.

"Q. Did you find any mud in her as she came up?

A. There was a little sediment in the cabin and on the deck.

Q. What did you do with that?

A. As she came up we washed it off.

Q. *Did that mud that you found in there have any effect in injuring the vessel by her weight or otherwise, as she came up?*

A. *No, sir, I don't think there was enough to do any damage. It may be it added a little weight onto her, but not enough to break down or destroy the house work.*"

LOOSING NOT ONLY NECESSARY TO RAISE HER.

Robert Don:

"Q. When you saw her, after she was raised, state whether or not there was slickens, and debris, and mud in her?

A. There was a little mud, not very much.

(pp. 330-331.)

That may have been a month after she was raised. She was lying over in Oakland.

* * * * * * *

When I saw her was over in Oakland, in Boole's Shipyard.

(p. 331.)

* * * * * * *

It might have been six months for all I know. That is where I saw her—over there."

(p. 332.)

THE HOUSES WERE DESTROYED IN THE COLLISION.

(Testimony of William Tucker.) Page 475.

"Q. As she came up was she injured any in the raising?

A. No, sir; the raising of her did not tend to injure the hull of the vessel at all. In regard to the house work the only thing that there was an injury to was in *cutting it down in order to allow it to pass up through these timbers.* The hull was just as good. There was no injury to the hull that I could see.

Q. I understood you to say the stanchions were knocked out on the port side, and that was careened over?

A. Yes, sir.

Q. Was that any injury to her, then?

A. It was injured, but we did not figure it that way in raising her.

Q. Was the cutting down of the house work in the condition you found it?

A. It did not tend to break that part down. That part that was damaged by the collision was between our timbers, the house work where we cut to allow the timbers to come up was some distance on each side of that break."

Beringer:

"Q. Do you remember whether or not the Mary Garrett, when she came alongside of the Dauntless, mashed in the sides of the house?

A. Yes; she crushed the upper deck there, the cabin deck.

Q. What was the position of the vessel at that time?

A. She was partly sunk then; she was landed right on the upper deck, you might say; she came right under the upper house. The hull was under water then.

Q. And crushed them?

A. Yes, sir, crushed them in."

(pp. 424-25.)

Rideout (p. 400):

"Q. Now, after you went alongside, did you break anything connected with the 'Dauntless'?

A. Well, I went alongside twice. After she was sunk, or before?

Q. On either occasion?

A. At the first occasion, I believe, when I went alongside to take the passengers off, she was—the guard of the Garrett pushed into the stanchion of the Dauntless on the side of the house.

Q. What stanchion do you mean?

A. I mean the side of the freight house.

Q. The stanchion on the side of the freight house?

A. Yes, sir."

Tucker (p. 473):

* * * "The stanchions underneath the flying-deck were all carried away.

Q. On which side were those stanchions carried away?

A. On the side she was struck—on the port side.

Q. And what effect did that have on the houses?

A. It caused the houses to fall down on that side. They were all leaning over to port, and nothing to support them, and racked the houses. The cabin doors were broke off."

Tucker (p. 486):

* * * * * * *

"A. I could not say there was any part of the house broken that had been put on her by the strain employed by other parties in trying to raise her. The part of the house that was broken and damaged by the collision was in the wake of where the hole was in her, on each side of that hole. The stanchions were all gone and the house was sunk down.

Q. For what distance was the house injured?

A. That I could not tell you exactly; I know there was quite a space there. It was broke right into the amidship part, and the sagging down in the fore part and after part was inclined to come down the same way as in any broken structure.

Q. How many stanchions were broken?

A. That I could not tell you.

Q. More than two?

A. I did not take notice. There was a space there I suppose; it might have been three times as long as this room—without any support.

Q. You do not attempt to say that the bow of the other vessel striking the Dauntless in the manner in which she was struck would tear all these stanchions down that distance?

A. I don't know how the stanchions came out of her. Whether they were caused by the collision

or what it was caused by. *It looked like it was caused, in the way the house was broke right where she was struck, that it was most likely done by the collision,* but that I cannot say for a fact. It looked like that.

Q. Certain of the stanchions may have been broken by the collision, and they giving away and the vessel being under water this length of time and different methods having been used in attempting to raise her, you could not say but what other parts of the house had given way and where it sagged was caused by that and not by the collision?

A. I did not see the vessel after she had been struck. I did not see the state of the house until she came up. I am merely giving my opinion of how I should suppose the thing was caused. I did not see it under water because you cannot see nothing around this bay. When she came up it looked that way to me, that it was caused by the collision.

Q. But not for the full length of the vessel?

A. No, sir, the house was not all gone the full length. I am talking about the wake of where she was struck. The other parts of the house that was damaged it was necessary to cut the house through in order to allow the timbers to come up past.

* * * * * * *

Q. This sagging of the houses of which you have spoken on your cross-examination, I understood you to say that not only did they sag towards the port where the stanchions were gone, but also from forward, aft, and aft forward, by reason of the stanchions being gone?

A. Yes, sir.

Q. Like any house where one end is knocked out it will come in?

A. It will come down that way, at the same time it will incline to port.

* * * * * * *

Q. As I understand you, on your cross-examination, from the examination that you made of

the vessel after she was raised, and your experience in such business, you concluded that the damage to the deck-house was damage done by the collision and not due to anything that happened to the vessel after her submersion?

* * * * * * *

A. That is what I said."

Loosing Hog chains Necessary To Raise Her

Tucker (p. 474):

Q. What condition did she come up, so far as her hull was concerned, with respect to injuries, outside of the collision?

A. I did not observe anything the matter with the hull. She came up all right. She did not seem to be hogged, or anything.

Q. Do you remember the loosening of the hog chains while she was being raised?

A. There were some of the hog chains *that we had to cut in order to let the timbers pass.*

Q. Did that have any tendency to hog the vessel at all?

A. No, sir. When these chains were cut she was on the bottom. The vessel was lying flat on the bottom. We cut the chains when we took the weight of her on the wires. She was laying evenly on the wires so as to prevent her from hogging.

Q. When you finally got her up was she hogged?

A. No, sir."

NO PROOF THAT WHITELAW COULD HAVE RAISED HER IN LESS TIME.

(Testimony of William Tucker.) Page 476.

"Q. Under any condition lying in the situation I have just indicated, what would you say with respect to the length of time it would have taken to have got her out?

A. It is a pretty hard thing to figure on the time in a job like that. There is a whole lot of

chain work connected with raising a vessel under water. You cannot see what you are doing. Just the time you think you have got her you lose her. In a good many cases when working under water raising a vessel you never know when you are going to get her until you get her up.

Q. What would you say with respect to ten days as being the probable time in which she could have been raised?

A. By the time you get your plant down on the scene of the wreck and get to work your ten days would be up, and you could not have done nothing in ten days with her.

Q. After you got your plant there and everything at work what have you to say with reference to ten days then in raising her?

A. I would not like to take the job to raise her in ten days.

Q. Do you think it would have been possible?

A. No, sir. I don't think it would have been possible for any one to have got her up in ten days.

Q. What has been your experience with reference to collisions, as to the time in wrecking vessels?

A. I have seen jobs where they calculate to get them up in thirty days, and they took three months. In other cases where they figured on getting the vessel up in ten days it took thirty; you cannot tell. Sometimes you strike it lucky and things go right and she comes up all right. There are lots of cases where there are holes in the vessels that you cannot find or locate. You put your pumps to work on her and cannot pump her out. You have to go to work and go over the work again and try and discover these leaks and breakages, and you put on more pumps, and sometimes your pumps break down ''

(p. 478.)

Whitelaw admits that "wrecking is uncertain."

(p. 290.)

If she was not damaged by the delay *time is immaterial.*

TESTIMONY OF ARTHUR ROBINSON.

"Went to work on the 'Dauntless' with Mr. Don (p. 362) about the latter part of September, 1901. I remained there about three months. Mr. Don was in charge when I first went there." (p. 363.)

FRIVOLOUS CHARGES AGAINST GILLIS.

IF TRUE, NO DAMAGE SHOWN.

(pp. 363-366):

"Q. Now, do you remember any occasions when the lines were removed from the place they had been fastened during the time that this attempted raising was going on, and while you were there?

A. Well, there was lots of times Mr. Gillis would come around and slack up the lines and throw off lines, that really, we thought, was detrimental to the progress of the work; that is, he was undoing what we would be working to do.

Q. Give an illustration of that, an example of that.

A. Well, we had an anchor out ahead there one time to a barge, had out one barge and an anchor out ahead of the other one, and there was a pretty good strain on both of them, and he comes out there while we were aboard of the steamer or something, and I happened to see him out there; I don't know what he was doing, but afterwards when we got out there we found this line all let go; and afterwards I asked him, 'What did you let that line go for'? and he called me down, and said he was bossing that job.

Q. What was the effect of casting off that line?

A. Well, it caused the barges to sheer sidewise with the tide, and brought a heavy strain on the chains that were underneath the 'Dauntless.' It let the strain go on the chains that went down on the sides of the barges; they had a strain on then; those lines that we had ahead were to hold those barges right in place alongside of the steamer; when you slacked up or let go one of those lines that were holding the barges and a strong tide is sweeping the barges and the boat is resting on the bottom of the river, the current on the barges sags them back and lets the duty of holding the barges there rest on the chain underneath there.

Q. What effect does it have on the progress of the work?

A. Well, we couldn't heave in by the chains any more until we got the anchor out again and pulled the barges back into place.

Q. What amount of time would that take?

A. That would take another tide.

Q. What length of time would that be?

A. There are two tides a day, twenty-four hours, two flood tides; approximately that would be twelve hours.

Q. Did you have to replace that rope from the place where it was taken off the anchor?

A. We would have to replace that or put another one out.

Q. *Did that occur on more than one occasion?*

A. *Oh, no,* but in regard to chains we had underneath it—

Q. What about the chains you had underneath?

A. I can remember one instance; of course, I can't remember all of them. But we had the chain over down the side of the steamer and up on the other side the end was almost to the top of the water; there was a shackle there, where it was shackled onto a line, and the shackle became unfastened, and after being under the boat this end of the rope dropped down to the bottom. Well, of course, it was not my judgment to pull it out, but

he insisted on us, after having that underneath the boat, insisted on us hauling it all the way out, where I wanted to send the diver down and leave him pick up that end where it was loose there right where it fell into the mud and run a shackle around it, but he had it hauled up.

Q. You said 'he.' Who do you mean by that?

A. Mr. Gillis.

Q. Now, on the occasion when these lines were cast off, was it on occasions when you were working or was it on occasions when you were away on the boat doing something else?

A. Well, we would be up on the job somewhere around there on the steamer or on the barge or somewhere; he was going around by himself.

Q. Who do you mean by 'he'?

A. Mr. Gillis.

Q. I will ask you to state whether you remonstrated with Mr. Gillis on different occasions about these matters and things?

A. I spoke to him several times, but he informed me that it was none of my business; he knew what he was doing, which I had to agree with; he was my boss.

Q. Did you ever speak to Mrs. Gillis about it?

A. I did.

Q. What did you say to her?

A. Well, I spoke to Mrs. Gillis lots of times in regard to it. The principal idea that I wanted to convey was I wanted to get Mr. Gillis to stay up in Stockton. I wanted her to try and keep Mr. Gillis away.

Q. Why?

A. Well, I thought we could get along better if he wasn't there.

Q. Faster?

A. Faster.

Q. What did Mrs. Gillis reply?

A. Well, she always told me—

Mr. Frank. I suppose this is all very entertaining. If you gentlemen think it has any bearing upon the amount of damages, you are welcome to it.

Mr. Levinsky. We certainly do, or we would not ask the questions.

Q. What was Mrs. Gillis' reply?

A. Well, she always told me that Mr. Gillis knew what he was about, and that I did not understand Mr. Gillis?

Q. Anything said about Mr. Gillis' motives or reasons?

A. No.

(p. 369):

"Q. Now, what effect, if any, did the casting off of these lines or chains, or the hauling of them up have upon the woodwork, the upper works of the 'Dauntless'?

A. The 'Dauntless' was under water then, and I could not, I would not be able to tell."

Robinson (p. 376):

"Q. Did you examine the 'Dauntless' for the purpose of ascertaining whether there were any marks of the Garrett's stem on her hull or where any guard was broken, or whether it was broken?

A. Yes.

Q. How did you come to do that?

A. Because I heard talk about the Garrett ramming her after the collision, and I wanted to see where she had struck.

Q. Did you find any marks of the Garrett' stem on her hull?

A. Not outside of the hole that she made during the first collision.

Q. Now, did you find any guard broken on the 'Dauntless'?

A. The guard was all broken in there, all knocked off.

Q. State whether or not it would have been possible for the Garrett's guard to have reached the *hog posts* or guards that were broken?

A. The Garrett's guard could not have reached into the *hog posts,* no.

Q. State whether or not it would have been possible for the guard to have broken those posts that were broken?

A. I don't see how."

(p. 376.)

* * * * * * *

There is no testimony that the *hog posts* were broken.

Mud Accumulations.

Robinson (pp. 373-74):

"Q. Now, state whether or not there was much mud had accumulated in the 'Dauntless' by reason of her drifting and floating around?

A. Oh, everybody knows that. Shucks, there was lots of mud in her.

Q. State whether or not you called Mr. Gillis' attention to that?

A. Yes, sir.

Q. What did you suggest and tell him?

A. I told him to play the fire hose in there and wash it out of the rooms, as she came above the water; as soon as we could get into the rooms, I wanted to take the fire hose and sluice it out.

Q. What did he say?

A. The same old thing, that he was doing it.

Q. What effect, if any, did this mud, the weight of this mud, have on the woodwork and upper works of the 'Dauntless'?

A. It increased the weight.

Q. Increased the weight of what?

A. Of the vessel.

Q. Did it make it easier or heavier to raise by reason of that?

A. Made it a good deal heavier.

Q. Now, with these hog chains loosened, as you have testified to, and this heavy weight of mud in the 'Dauntless', what effect did it have upon the upper works?

A. Well, it would have the effect to help *to crush her, that is, to cave her in.*''

(pp. 373-74.)

It was evidently Robinson's idea to make the ''shucks, there was lots of mud in her'' account for the crushing in of the deck houses.

* * * * * * *

Cross-examination (pp. 389-390):

''Q. Now, you have testified to other suggestions that you made to Mr. Gillis during the time of the raising, for instance, concerning the washing of the mud out of the vessel? Who was in charge at that time, when you made those suggestions?

A. Well, *that was after she came up; that must have been Mr. Roach.*

Q. Mr. Roach must have been—was in charge?

A. Yes, sir.

Q. You considered Mr. Roach a competent man, did you not, for that work?

A. Yes, sir.

Q. These suggestions that you made were simply your ideas, but you did not approach Mr. Roach with them, did you?

A. I did not reproach him.

Q. You did not suggest them to him—you did not approach him and suggest them to him?

A. Yes, I talked it over with him.

Q. He did not adopt your suggestions?

A. No, he did not; I just offered it for the good of the job, that is all.

Q. Now, how long did you say you were there, about three months?

A. About three months.

Q. Now, during that time, Mr. Roach and Mr. Don were doing everything they could to keep the vessel up, were they not?

A. I should suppose so; as far as I know, they did.

Q. Acting in good faith and working as diligently as they knew how on it?

A. Yes, sir.

Q. *Both competent men, too, were they not?*

A. *I considered them such.*

Mr. Eells. Who were both competent men?

Mr. Frank. Mr. Roach and Mr. Don.

The Witness. Mr. Roach and Mr. Don."

The witness is mistaken regarding the man in charge at that time. It was Tucker, not Roach, and we have already seen what Tucker's ideas are on this subject.

Unloosing Hog Chains.

Robinson (p. 369):

"Q. I will ask you to state, if you know, whether the hog chains of the Dauntless were cut, and if so, by whom?

A. Well, they were unfastened; they might have been; most of them could have been let go by unscrewing them, unbuckling them.

Q. Were they?

A. Yes.

Q. The turn-buckles had been unscrewed?

A. They were unfastened, unscrewed, slacked up.

Q. Do you know by whom?

A. By the crew there, the workmen."

(p. 369.)

* * * * * * *

(pp. 370-372.)

"Q. What effect did the loosening of these hog chains, these buckles that you have testified to, have upon the 'Dauntless'?

A. Well, the immediate effect would be to let her sag out of shape; that is all that holds the boat in shape.

Q. Well, now, in sagging out of shape, what effect would that have on her upper works, as you call it?

A. Well, it would make them crack.

Q. What effect would it have on the frame?

A. The frame and the upper works would go out of shape with the hull.

Q. And what effect would that have, that going out of shape? State whether or not it would tear them or remove them from the hull.

A. Well, it would loosen them, weaken them.

Q. *State whether or not the boat could have been raised without loosening those chains?*

A. *That would simply be asking my opinion; the only answer I could give to that would be according to my opinion.*

Q. Give your opinion.

A. *Well, of course, it could be done another way. You couldn't do it that way, but it could be done.*

Q. Had the loosening of the chains anything to do with the raising of the boat, if the boat were being raised in a proper manner?

A. You say, would the loosening of the chains have anything to do with the raising of the boat, if she were raised in the proper manner?

Q. By that I mean, could that boat have been raised in another manner without loosening those chains?

A. I think so—in my estimation, in my judgment.

Q. Now, when you went down to the wreck—

A. The 'J. D. Peters' was raised that way.

Q. Raised by loosening the chains?

A. Without it."

(p. 387.)

"Q. You have said something about the hog chains being unbuckled?

A. Yes.

Q. When was it that you observed that? *When did you first observe that,* how long after the accident?

A. I cannot give the date, it was, I will say, when we began to raise the boat, *when she began to come above the surface of the water.''*

(p. 387.)

* * * * * * *

(pp. 388-89):

''Q. Then you did not see any of the crew unloosen these buckles, did you?

A. Why, certainly I did.

Q. But it was done after she was raised above the top?

A. Why, certainly. I explained at the beginning of this, when you asked that question before, that we did that after they came above the water, the hog chains and hog posts.

Q. After they came above the water?

A. Yes, the tops of them.

Q. Now, who did it?

A. The crew, the men.

Q. The men did it?

A. Yes.

Q. How many men did it?

A. Well, sometimes it would take one man and sometimes two or three men.

Q. Was Mr. Don around when that happened?

A. No, Mr. Don had left there.

Q. When did he leave?

A. Well, I would have to—that is dates again, which I cannot fix.

Q. How long did he leave before this thing happened?

A. He had most of the work done when he left—well, it was about a couple of weeks, if I can recollect—inside of a couple of weeks, as she began to come up, out of the water.

Q. Did he leave before she was raised?
A. Yes, sir.
Q. He did leave before she was raised?
A. Yes.
Q. And it was after Mr. Don left that this thing happened?
A. Yes, sir.
Q. *Who else was present besides yourself when it happened?*
A. *Well, of course the other diver—the other man that took charge there.*
Q. Who was the other man that took charge there?
A. *Mr. Roach.*
Q. Mr. Roach?
A. Yes; he took Mr. Don's place.
Q. *Was he present?*
A. *Yes, sir.*
Q. *Overseeing the job?*
A. *Yes, sir.*
Q. *It was done under his direction?*
A. *I suppose so.*"

* * * * * * *

Again the witness has confounded Mr. Roach with Mr. Tucker. Mr. Tucker and Mr. Whitelaw both explained that the hog chains must be loosed when the vessel approaches the surface in order to let the timbers pass (p. 474).

The foregoing is what the opinion of this court speaks of as "*uncontradicted evidence proving* that the "hull was weakened by loosening or removing the hog "chains while the work of raising the vessel was pro- "gressing".

We ask the court now to reconsider that statement, and say whether, in the light of that testimony, it be justified.

We contend (1) that the evidence does not warrant the conclusion; (2) that, if it be true that the hull was weakened by loosening the hog chains, the evidence is conclusive that *it was a necessary element in a proper and skillful operation of salvage,* and hence a damage for which the vessel, at fault in the collision, is as much liable, as for the hole that the stem made.

Since that conclusion seems to have had a controlling influence on the mind of the court, we sincerely hope that the testimony will receive careful attention.

This is the only witness who attempts to discredit Mr. Gillis' operations. The foregoing testimony discloses the pettiness of his charges. Some of the matters referred to are like the petulant complainings of a child, and the loosing of the hog chains is squarely met by the fact that it was an *act done under the sanction and authority of Tucker and Roach,* who were conceded to be competent men, and was by Tucker deemed the best method of proceeding.

The foregoing testimony shows conclusively that Mr. Gillis was reasonably prompt in beginning operations. He had first to seek aid. For this purpose he went to both Whitelaw and to the Navigation Company. A reasonable time must be allowed to him for determining the best method of proceeding. Human affairs are not wisely done that are done without consideration, and time is a most important element in due consideration. Within three weeks after his interview with Whitelaw he got both men and appliances from him. Before that he had started to work with Delaney and Don. Tucker,

Whitelaw's man on the job, disposes of Whitelaw's pretensions of a 15 day job. Our most severe critic—Arthur Robinson—concedes *both Don and Roach were competent men,* and Don was on the job for three months, all the time employing what, under the evidence, must be conceded to be the *best method.*

That testimony also proves that, during the raising, the vessel suffered no damage except what was necessarily incident to the operation of raising *by that best method. In this statement we include her hogging, which we think occurred at some time before she came to the surface,* notwithstanding Tucker's testimony. This we shall illustrate under the next heading.

If there be any doubt as to whether the hogging was a necessary or unnecessary result of raising, that doubt must be resolved in favor of the "Dauntless", in accord with the principle discussed under the heading II of this petition.

In that connection it is not out of place to observe that the disposition of this court to place the *onus* of proof in this particular on the "Dauntless" is *placing a premium upon the fillibustering of the petitioner* by which it succeeded in delaying proceedings until *the death of Mr. Gillis and other casualties* have made that *onus* difficult. That difficulty is suggested by the court in its opinion. The importance is great, therefore, that the correct rule should be observed.

That testimony further shows that time of operations is immaterial, since the only danger from that source

was the mud accumulations, which were *in*considerable and did no damage.

That testimony further proves that the men employed by Mr. Gillis were *competent, and there is not a word in the record to the contrary.* Even Robinson admits it. Whitelaw could not have done better, for both his men and appliances were used.

VII.

DAMAGE AFTER RAISING AND BEFORE SALE.

Accepting, for the present the testimony of Tucker, that the vessel was *not* hogged when delivered at Stockton, and the testimony of Rideout that when he got her she *was* hogged—which is the only additional damage which, under any view of the evidence, she could have suffered after delivery at Stockton, the first pertinent inquiry is, who is liable for that damage?

There is absolutely *no evidence* in the record *to show that it was the result of any negligence* or want of care on the part of Gillis or his company. That conclusion rests on a mere inference drawn by the court from the testimony of her delivery at Stockton unhogged and her subsequent delivery to Rideout hogged.

If that be the fact, who was negligent, and what was the negligence that caused it?

When Delivered at Stockton She Was Placed in the Shipyard of the California Navigation and Improvement Co., Owner of the Mary Garratt.

Robinson (p. 374):

"Q. What steamer did take the 'Dauntless' to Stockton?

A. The 'McDonald.'

Q. Owned by the California Navigation & Improvement Company?

A. Yes, sir.

Q. Did you have any conversation with Mr. Gillis as to why he wanted the 'McDonald' or why he had the 'McDonald' take her to Stockton, instead of having her taken by the 'Columbia'?

A. He said it would look better."

* * * * * * *

(p. 375):

"Q. What did he say, give as near as you can the entire conversation as to what he said, or his language, about when the 'Dauntless' was landed at the shipyard at Stockton, whose boat she would be, and where she would go, and what she would do?

A. I asked him where he was going to land her, and *he said he was going to put her over at the shipyard; there was only one shipyard there;* and he says that is all I have to do; then I will go to the office in the morning and get my money for her.

* * * * * * *

Q. *And that was the shipyard of the California Navigation & Improvement Company?*

A. *Yes, sir, that was the shipyard; that is the only large shipyard there.*"

John Grant (p. 437):

"Q. Did you examine the 'Dauntless' after she was raised and brought to Stockton?

A. Yes, sir.

Q. At whose request?

A. Well, I don't know that it was at anybody's request; *she was brought to the shipyard, and I couldn't help but examine her.*"

SHE WAS THEN OFFERED TO THE NAVIGATION COMPANY TO REPAIR.

(p. 271):

"Q. After the 'Dauntless' was raised, Mrs. Gillis, was any offer made to the California Navigation & Improvement Company with respect to the repair or disposal of the wreck?

A. Yes, sir.

Q. Now, how, and by whom, was that communication made?

* * * * * * *

A. I don't quite understand you, Mr. Frank.

(Reporter reads the previous question.)

A. Yes, Mr. Gillis went to the California Navigation & Improvement Company——

Mr. Levinsky objects, etc.

Q. Go on, Mrs. Gillis.

A. Mr. Gillis went to the board and said 'Gentlemen——

The COMMISSIONER. Were you present, Mrs. Gillis?

A. The president of the company told me what Mr. Gillis said."

* * * * * * *

(p. 273):

"Q. Who was the president of the California Navigation & Improvement Company at that time?

A. At the time of this conversation—Mr. Newell—Mr. Sidney Newell was president of the company; I was on board of his steamer, on board of the 'J. D. Peters'. He was on board of this vessel at the same time.

Q. State what, if anything, he said to you with respect to the offer—[interruption] with respect to the offer made by Mr. Gillis of the wreck of the 'Dauntless' and the request for her repair?

A. He related to me that Mr. Gillis had come to him—[interrupted].

(p. 274):

Answer the question. Read the question to the witness, Mr. Reporter.

(The reporter reads the previous question.)

A. He said that he ignored Mr. Gillis; that his request was without any consideration from himself or his company.

Q. Did he state what the request was?

A. The request was that *Mr. Gillis offered the Navigation Line the wreck to repair, to put in place as it was destroyed, or to pay him for the wreck.''*

That is all the testimony regarding her care, during the time in question. *There is no evidence of negligence of any kind.* If that was the only shipyard in the place, it was the only place to keep her. As it was the Navigation Company's shipyard, she must have been constantly under the observation of the Navigation Co., and if hogged *there* through lack of care, that company would have known it. We may be sure, from the nature of the testimony offered by them on that particular defense, that if such a fact existed, *they would have proved it.* But not a word is offered on the subject. Their entire effort was directed to prove she was hogged by unskilful raising. When the court drew the inference from Tucker and Rideout's testimony, it overlooked this fact which proves either that, the inference is wrong, or that *the Navigation Company itself was to*

blame for anything that may have happened to the vessel while in their yard, and hence in their care.

In any event, if the damage occurred *there,* there is no evidence to charge *Gillis* with fault in respect to her care, and hence, under the rule already referred to (ante Point II) he is entitled to recover for that damage.

The Evidence Tends to Show It Was Not Done While Lying at Stockton.

John Grant, who saw her in the shipyard, says: p. 451

"Q. With reference to the dropping of the hog chains, you were not there when that was done?

A. No, sir.

Q. You don't know where her situation was, or how she was supported, or——

A. I don't know how they carried away, *but I know she was hogged when it was brought to me,*— they were carried away.

Q. What effect that had on it you don't know because you don't know what the situation was?

A. The effect of letting her chains go would straighten her out, that is of course *I seen the effect when they brought her out.*

Q. *You saw that hogging?*

A. *Yes, sir.*

Q. You don't know whether it was the result of letting go the hog chains or the result of something else, she could have been hogged before that time though might she not?

A. Yes, sir.

Q. In fact, lying on an uneven bottom——

A. Would carry them away.

Q. Would carry them away and hog her?

A. Yes, sir."

(p. 452):

> "Q. *In your opinion the damage that was done to her in raising her was necessary. She could not have been raised without it?*
> A. *I don't think she could, no sir.*"

Grant saw her *when she came to the shipyard*, and says she was already hogged. If this be no more than a conflict of testimony between him and Tucker, the finding of the two lower tribunals should be affirmed. Certain it is, that *there is no evidence* that it occurred there. All, excepting Robinson, seem to agree that a loosing of her hog chains was a necessary incident of her raising, and even his partisanship can only give a half hearted negative to the suggestion.

This brings us back to the fact that the hogging was done as a necessary incident to the raising of the vessel, which operation was done in a skilful and proper manner, and therefore the damage should be paid for by the petitioner.

Also to the proposition that if there be any doubt regarding these matters, the *onus* is on the petitioner to prove such matters by clear and positive evidence, which it seems to be the opinion of the court was not done "and possibly cannot be done".

We respectfully suggest that the opinion rendered is radically wrong, and that a rehearing should be granted to the end that the judgment of the District Court should be affirmed, with the modification that the limitation be denied.

Nathan H. Frank,
Proctor for Appellees.

No. 1791

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

Mrs. WONG HEUNG,

Appellant,

vs.

C. T. ELLIOTT, United States Marshal, in and for the Northern District of California,

Appellee.

In the Matter of the Petition of Mrs. WONG HEUNG for a Writ of Habeas Corpus.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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Room 317, U. S. Postoffice and Court House Bldg., San Francisco, California.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

Petition for a Writ of Habeas Corpus.

To the Honorable WM. C. VAN FLEET, District Judge Presiding in the United States Circuit Court, Ninth Circuit, Northern District of California.

The petition of Mrs. Wong Heung respectfully shows:

That Mrs. Wong Heung is unlawfully imprisoned, detained, confined and restrained of her liberty by C. T. Elliott, United States Marshal in and for the Northern District of the State of California, in the City and County of San Francisco, State and Northern District of California.

That the said imprisonment, detention, confinement and restraint are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by the said C. T. Elliott, United States Marshal as aforesaid, that the said Mrs. Wong Heung is held by him and in his custody, under certain findings, judgment and order of deportation, by which he, the said marshal, is directed to deport your petitioner, Mrs. Wong Heung, in such findings, judgment and order described as Wong Chun, from the United States to China, she, your petitioner, having been therein found on September 27th, 1907, the date upon which the findings, judgment and order of deportation was made and entered, to have been a Chinese person illegally domiciled within the United States of America. That said findings, judgment and order of deportation made and entered by E. H. Heacock, United States Commissioner in and for the Northern District of California, on the 27th day of September, 1907, as aforesaid, was ordered affirmed by the Judge of the District Court of the United States, in and for the Northern District of California, on February 7th, 1908, and said judgment having been thereafter affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, and the mandate thereof spread upon the minutes of the District Court of the United States, in and for the Northern District of the State of California, and your petitioner being upon the 7th day of July, 1909, ordered into the custody of C. T. Elliott, United States Marshal, as aforesaid, in execution of the said findings, judgment and order of deportation, and said order affirming same. The said Marshal now holds your petitioner subject to said findings, judgment and order of deportation and said order affirm-

ing same, and intends to execute the same as therein directed. A copy of said findings, judgment and order of deportation and a copy of the order affirming the judgment of United States Commissioner Heacock, are hereunto annexed and marked respectively Exhibit "A" and Exhibit "B."

That in said proceedings your petitioner was charged with "a violation of the Act of Congress of the United States, entitled 'An Act to prohibit the coming of Chinese persons into the United States,' approved May 5th, 1892, and of the Act amendatory thereof, approved November 3d, 1893, and the Act of Congress, approved April 29th, 1902."

Your petitioner alleges that upon the 31st day of July, 1907, the day of the arrest of your petitioner in said deportation proceedings; that upon the 27th day of September, 1907, the date of the said findings, judgment and order of deportation, and upon the 7th day of February, 1908, the date of the said order affirming the judgment of the United States Commissioner, your petitioner was according to the orders of the United States Commissioner, and the Judge of the District Court of the United States for the Northern District of California, a Chinese laborer unlawfully domiciled within the United States, and as such was subject to deportation from the United States.

Your petitioner alleges that her status as a Chinese person illegally within the United States has, since said last mentioned date, been changed to that of a person lawfully domiciled and resident within the United States, for the reason that upon the 28th day

of October, 1908, your petitioner was united in matrimony to Wong Heung, in the city of Oakland, county of Alameda, State of California. That the said Wong Heung is a native-born citizen of the United States of America, and his status as such was the subject of judicial investigation, and was so determined in the proceedings known, designated and entitled as follows, to wit: "In the District Court of the United States, Northern District of California, In the Matter of Wong Heung, on Habeas Corpus, No. 9479."

Therefore, your petitioner alleges that by said marriage her status was changed from that of a Chinese person illegally resident within the United States, to that of the wife of a native-born citizen of the United States, and that as such she is entitled to remain and reside within the United States, notwithstanding said findings, judgment and order of deportation, and order affirming the same.

Wherefore, your petitioner prays that a Writ of Habeas Corpus may be granted directed to the said C. T. Elliott, United States Marshal in and for the Northern District of California, commanding him to have the body of your petitioner before your Honor, at a time and place therein to be considered by your Honor concerning your petitioner, together with the time and cause of the detention of your petitioner and said Writ; and that your petitioner may be hence restored to her liberty, and that in the meantime this Court admit your petitioner to bail in the

sum of ——— Dollars pending the hearing and final determination of this proceeding.

her
Mrs. X WONG HEUNG,
mark
Petitioner.

Dated, San Francisco, California, July 7th, 1909.

Exhibit "A" [to Petition for a Writ of Habeas Corpus].

Copy.

Before E. H. HEACOCK, United States Commissioner for the Northern District of California, at San Francisco.

No. 1947.

UNITED STATES OF AMERICA

vs.

WONG CHUN (Female).

Findings, Judgment and Order of Deportation [of U. S. Commissioner].

A complaint verified by the oath of Richard H. Taylor, United States Immigrant Inspector, having been filed before me, the undersigned United States Commissioner, charging the above-named Wong Chun with a violation of the Act of Congress of the United States, entitled "An Act to prohibit the coming of Chinese persons into the United States," approved May 5th, 1892, and of the Act amendatory thereof, approved November 3d, 1893, and the Act of Congress, approved April 29th, 1902, and a warrant for the arrest of the said Wong Chun having been

issued by me thereon, and the said Wong Chun having been duly apprehended upon the said warrant by the United States Marshal for the Northern District of California, and brought before me for hearing upon said charge, on the 1st day of August, 1907 (the United States Attorney for the Northern District of California having duly designated me as the United States Commissioner before whom said Wong Chun should be taken for hearing), now on this 27th day of September, A. D. 1907, the said Wong Chun being present in person and her attorney Geo. A. McGowan and F. C. Clift, and Asst. U. S. Atty. B. L. McKinley appearing for the United States, this cause having been duly heard and submitted, and due consideration having been thereon had, I do find as follows:

That the defendant is a Chinese person, and at all times during her residence in the United States has been, and now is, a manual laborer within the true intent and meaning of the Chinese exclusion acts; that on the 31st day of July, 1907, she was found within the State and Northern District of California, without the certificate of residence required by Section Six of the Act of Congress, entitled "An Act to prohibit the coming of Chinese persons into the United States," approved May 5th, 1892, and the acts amendatory thereof, and she has not clearly established to my satisfaction that by reason of accident, *sickness, other* avoidable cause, she has been unable to procure such certificate of residence. I further find that the defendant was not born within the United States.

And as a conclusion of law, I find that the defendant is unlawfully in the United States, and is not lawfully entitled to be in and remain therein.

It is, therefore, ordered, adjudged and decreed that the defendant, Wong Chun, be deported from the United States to China; and it is further ordered that she be committed to the custody of the United States Marshal for the Northern District of California, to carry this judgment of deportation into effect.

Witness my hand at my office, in the City and County of San Francisco, in the District aforesaid, this 27th day of September, A. D. 1907.

[Seal] E. H. HEACOCK,

United States Commissioner for the Northern District of California, at San Francisco.

Exhibit "B" [to Petition for a Writ of Habeas Corpus].

Copy.

In the District Court of the United States, for the Northern District of California.

No. 4525.

THE UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

WONG CHUN,

Defendant *and Plaintiff.*

Order Affirming Judgment of U. S. Commissioner.

Upon consideration of the evidence and of the law applicable thereto:

Ordered that the judgment of the Commissioner herein be, and the same is hereby affirmed.

Dated, San Francisco, Cal., February 7th, 1908.

JOHN J. DE HAVEN,
Judge.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

VERIFICATION.

State of California,
City and County of San Francisco,
Northern District of California,
United States of America,—ss.

Mrs. Wong Heung, being duly sworn, says:

That she is the petitioner above named; that she has heard read the foregoing petition, and knows the contents thereof, and that the same is true of her own knowledge except as to the matters therein stated upon information and belief, and as to such matters that she believes it to be true.

Her
Mrs. X WONG HEUNG.
Mark.

Subscribed and sworn to before me, this 7th day of July, 1909.

[Seal] J. A. SCHAERTZER,
Deputy Clerk U. S. Circuit Court, Northern District of California.

GEO. H. BURNHAM,
Witness to Mark.

[Endorsed]: Filed July 8, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

Demurrer to Petition.

Now comes C. T. Elliott, United States Marshal for the Northern District of California, the respondent to the order to show cause issued herein, and demurs to the petition for a writ of Habeas Corpus filed on behalf of the Chinese female person therein designated as Mrs. Wong Heung upon the following grounds, to wit:

I.

That said petition does not state facts sufficient to show that the said person therein alleged to be detained by this respondent is unlawfully imprisoned, detained, confined or restrained of her liberty by the respondent.

II.

That said petition does not state facts sufficient to show that the person therein alleged to be de-

tained by respondent is entitled to the relief prayed for in said petition.

III.

That said petition affirmatively shows on its face that this respondent holds the said person under and by virtue of a valid order of a court of the United States which had full jurisdiction to make the same, and that such order is now in full force, effect and virtue.

Wherefore, respondent prays that said petition be dismissed and that said order to show cause be discharged and that said petitioner be remanded into custody of respondent.

Dated, July 13th, 1909.

ROBT. T. DEVLIN,

United States Attorney, Attorney for Respondent.

Service of the within Demurrer by copy admitted this 13 day of July, 1909.

McGOWAN & WORLEY,

Attorney for Petitioner.

[Endorsed]: Filed July 13th, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

Return to Order to Show Cause.

Now comes C. T. Elliott, United States Marshal for the Northern District of California, and makes

this his return to the order to show cause issued herein and alleges as follows:

That this respondent holds the petitioner who is called in said petition by the name of Mrs. Wong Heung in his official custody as United States Marshal for the Northern District of California, under the name of Wong Chun and that the time and cause of the detention of said petitioner are as follows, to wit:

That on the 27th day of September, A. D. 1907, E. H. Heacock, United States Commissioner for the Northern District of California, at San Francisco, after a due and regular hearing in that behalf duly and regularly made and entered his findings, judgment and order of deportation against the said Wong Chun, a copy of which is attached to the petition herein and marked Exhibit "A," to which reference is hereby made. That thereafter the said Wong Chun appealed to the District Court of the United States for the Northern District of California from said findings, order and judgment and that on the 7th day of February, A. D. 1908, the judgment of said United States Commissioner was by said Court duly and regularly affirmed. That a copy of the order of said District Court affirming said judgment is attached to the petition herein and marked Exhibit "B," to which reference is hereby made. That thereafter the said Wong Chun appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment aforesaid and that said judgment was by said United States Circuit Court of Appeals thereafter affirmed. That on the

7th day of July, A. D. 1909, after proper proceedings in that behalf were held, the said Wong Chun was in the District Court aforesaid ordered remanded into the custody of the respondent in execution of said findings, judgment and order of deportation and said order affirming same. That respondent holds Wong Chun, in said petition called by the name of Mrs. Wong Heung, in his custody as such United States Marshal for the purpose of deporting her to China pursuant to the findings, order and judgment aforesaid.

That with respect to the allegations contained in the petition for the Writ of Habeas Corpus filed herein, on the 3d page thereof beginning on line 7 and ending on line 26 of said 3d page, respondent alleges that he has no information or belief sufficient to enable him to answer said allegations or any of them, and for that reason respondent denies said allegations and each and all of them.

Respondent denies, upon his information and belief as aforesaid, that the status of the petitioner as a Chinese person illegally within the United States has been changed since the 7th day of February, 1908, to that of a person lawfully domiciled and resident within the United States. Respondent denies, upon his information and belief as aforesaid, that upon the 28th day of October, 1908, or at any other time or at all the petitioner was united in matrimony to Wong Heung in the city of Oakland, County of Alameda, State of California, or at any other place or at all.

Respondent denies, upon his information and belief, as aforesaid, that said Wong Heung is a native-born citizen of the United States of America and further denies that by said marriage or by any marriage or at all the status of the petitioner was changed from that of a Chinese person illegally a resident within the United States to that of the wife of a native-born citizen of the United States, and denies that as such the petitioner is entitled to remain a resident within the United States notwithstanding the findings, judgment and order of deportation and the order affirming the same as aforesaid.

And respondent further answering to said petition upon his information and belief denies that said petitioner was married in good faith or at all to the said Wong Heung and alleges and avers upon his information and belief as aforesaid that any form of ceremony which may have been conducted or carried out between the petitioner and said Wong Heung was conducted and carried out solely with the intent and for the purpose of evading the judgment, findings and order of deportation as aforesaid and of enabling the said petitioner to remain within the United States notwithstanding the said findings, order and judgment.

Wherefore, respondent prays that the Writ herein may be dismissed and the petitioner remanded into his official custody for the purpose of carrying out and executing the findings, judgment and order aforesaid.

C. T. ELLIOTT,

United States Marshal for the Northern District of California, Respondent.

United States of America,
State of California,
City and County of San Francisco,—ss.

C. T. Elliott, being first duly sworn, deposes and says: That he is the United States Marshal for the Northern District of California, and the respondent in the above-entitled matter; that he has read the above and foregoing Return and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

C. T. ELLIOTT,
United States Marshal.

Subscribed and sworn to before me this 13th day of July, 1909.

[Seal] FRANCIS KRULL,
United States Commissioner.

Service of the within return by copy admitted this 14th day of July, 1909.

McGOWAN & WORLEY,
Attorney for Petitioner.

[Endorsed]: Filed July 14th, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEONG, on Application for a Writ of Habeas Corpus.

Opinion.

McGOWAN & WORLEY, for Petitioner.

ROBERT T. DEVLIN, United States Attorney, and

GEORGE CLARK, Asst. United States Attorney, for Respondent.

VAN FLEET, District Judge.

In this matter heretofore heard and submitted before me upon an order to show cause why the writ of habeas corpus should not issue, I find from a consideration of the evidence introduced at the hearing that all the allegations contained in the answer of the respondent C. T. Elliott, as Marshal for this District, are true; and I further find that the marriage of said petitioner to Wong Heong, as set forth in the petition and referred to in the answer of respondent, was not entered into in good faith, but was a mere sham, pretense, and form, had and entered into between petitioner and said Wong Heong, solely with the purpose and intent of evading the effect of the findings, judgment, and order of deportation theretofore had and then existing against said petitioner as alleged in said petition and answer, and to enable the said petitioner to remain within the

United States, notwithstanding the existence of said order of deportation.

From these facts I conclude that said pretended marriage did not effect a change in the legal status of petitioner as it existed at the date the same was entered into, nor avoid the effect of the judgment and order of deportation aforesaid. Upon the foregoing facts and conclusions I hold that, within the principles of Looe Shee v. North, 170 Fed. 566, and the cases there cited, the petitioner is not entitled to the writ of habeas corpus. The order to show cause is therefore discharged and the application denied.

[Endorsed]: Filed August 31, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

At a stated term, July term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Tuesday, the 31st day of August, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,912.

In the Matter of Mrs. WONG HEONG on Habeas Corpus.

Order Denying Application for Writ of Habeas Corpus.

Petitioner's application for the writ of habeas corpus (by order to show cause) heretofore submitted

being now fully considered and the Court having rendered its opinion in writing, it was ordered, in accordance with said opinion, that the application be and the same is hereby denied and that the rule to show cause be and the same is hereby discharged.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEUNG, for a Writ of Habeas Corpus.

Bill of Exceptions.

Be it remembered, that heretofore the above-entitled matter came on regularly to be heard before this Court, sitting without a jury. Geo. A. McGowan, Esq., representing the petitioner, and Benjamin L. McKinley, Esq., Assistant United States Attorney, representing the United States Marshal in and for the Northern District of the State of California.

The matter herein being a hearing upon the return to an Order to Show Cause why a Writ of Habeas Corpus should not issue in pursuance to the prayer contained in the petition for a Writ of Habeas Corpus; the Assistant United States Attorney presented and filed his return to said order to show cause; a hearing was then had upon the issues joined; witnesses were examined and documents introduced in evidence, and after argument by counsel the Court took the said matter under advisement, and

thereafter, to wit, on the 31st day of August, 1909, rendered its decision dismissing the order to show cause and denying the application for a Writ of Habeas Corpus as prayed for in said petition.

That during the proceedings in said matter, and during the hearing thereof, certain objections were made by the petitioner, and certain rulings were made by the Court, all as will more fully appear from the transcript of testimony and the record in the proceedings had in said matter, which said transcript, beginning immediately after the return of the United States Marshal had been filed in open court, containing all of the testimony and evidence given and introduced in said matter, is as follows:

Mr. McGOWAN.—It is stipulated by and between counsel for the petitioner and the Government, that this record number 9479 in the matter of Wong Heung on Habeas Corpus, is from the office of the clerk of the United States District Court in and for the Northern District of California. Mr. Krull had to return.

Mr. McKINLEY.—Mr. Krull tells me that he brought that record from the office and I do not question that. I have not seen the record.

Mr. McGOWAN.—The record consists of a petition and various papers, together with the report of the special referee and examiner, Ward McAllister, Jr., which is as follows:

"Pursuant to the order of the above-named court, duly made and entered herein, pursuant to the order of said court, duly made and entered on the 7th day of August, A. D. 1888, referring the above-entitled

matter to the undersigned, a special referee and examiner of said court, with instructions to find the facts and his conclusions of law, and to report a judgment therein, the said matter having been regularly brought on for hearing, and the same having been duly heard and submitted, and due consideration having been thereon had, I, the said Special Referee and Examiner, do find as follows:

"That the above-named petitioner was born in the United States 21 years ago.

"And as a conclusion of law I find that said petitioner is entitled to re-enter and remain in the United States.

"I do therefore report that, in my opinion, judgment should be entered herein:

"That the said petitioner is illegally restrained of his liberty, as alleged in the petition herein, and that he be discharged from custody from which he has been produced, and that he go hence without day.

"No exceptions were taken to the above report by the United States or by the petitioner.

"Heard August 14th, 1890.

"WARD McALLISTER,
Special Referee and Examiner.

"The above report of the Special Referee and Examiner is confirmed, and judgment is ordered to be entered in accordance therewith.

OGDEN HOFFMAN,
District Judge."

"Feb. 3, 1891.

—together with the Order of Discharge. After title of the court and cause of action.

"This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here ordered, that the said named person in whose behalf the Writ of Habeas Corpus herein was sued out, is illegally restrained of his liberty, as alleged, in the petition herein, and that he be, and he is hereby, discharged from the custody from which he has been produced, and that he go hence without day.

"Entered this 3 day of Feby., 1891.

"SOUTHARD HOFFMAN,

Clerk."

Contained in said record is a photographic likeness of the detained which is marked 9479.

The COURT.—How does that come to be a photograph of the detained in that record?

Mr. McGOWAN.—This is a photograph of Wong Heong.

The COURT.—You said of the detained.

Mr. McGOWAN.—I said the detained in this matter now before the Court.

Mr. McKINLEY.—I do not understand that that record is offered at this time.

Mr. McGOWAN.—We make the formal offer of the record proving the citizenship of the husband.

Mr. McKINLEY.—I object to it as it is not proven that this is the husband.

The COURT.—I know, but it cannot be proved all together.

(Testimony of Jee Gam.)

Mr. McKINLEY.—Certainly not, but I think the other ought to come first.

The COURT.—It is a mere matter of order of proof.

Mr. McKINLEY.—Very well.

[Testimony of Jee Gam, for the Petitioner.]

JEE GAM, called for the petitioner, sworn.

Mr. McGOWAN.—Q. What is your name?

A. Jee Gam.

Q. And your occupation?

A. Minister and interpreter.

Q. You are a minister? A. Yes, sir.

Q. You are also an interpreter for the courts of Alameda county? A. Yes, sir.

Q. I show you a marriage license and certificate, or rather a certified copy of a marriage license and certificate—

The COURT.—You had better prove the fact that he is a minister.

Mr. McGOWAN.—The marriage ceremony was not performed by Jee Gam. He was a witness to the marriage.

Q. —issued to Wong Heong and Wong Chun on the 28th day of October, 1908—

The COURT.—Where is this woman?

Mr. McGOWAN.—In the custody of the Marshal.

The COURT.—I want her here.

The MARSHAL.—She is in the Alameda County Jail. Mr. McKinley informed me it was not necessary to have her present.

(Testimony of Jee Gam.)

The COURT.—I want to examine her myself.

The MARSHAL.—We can get her here as quick as we can go there and get back. I was under the impression she was not needed.

Mr. McGOWAN.—Q. To which is annexed the certificate of the Justice of the Peace of the County of Alameda, James G. Quinn certifying that he performed this marriage ceremony with Philip M. Walsh of Oakland as one witness, and yourself as another—

The COURT.—Who is "yourself"?

Mr. McGOWAN.—The witness.

Q. —to which license and certificate is annexed a photographic likeness of the groom and bride. I will ask you if you recall that marriage; if you were present at the time that the marriage was celebrated?

A. I was present and interpreter there. I was interpreter in the County Clerk's office when they got the license, and also at the marriage at the Justice's Court, Judge Quinn.

Cross-examination.

Mr. McKINLEY.—Q. Who was it that arranged that marriage?

A. Mr. Walsh, the attorney.

Q. Mr. Walsh arranged the marriage. Who was it that suggested that marriage first?

A. I don't know, Mr. Walsh sent for me and wanted me to go to the county clerk's office to interpret.

Q. Did you know either of these people before that time? A. No, sir.

(Testimony of Jee Gam.)

Q. You never saw either of them in your life?

A. No, sir.

Q. Are you sure those are the two people that were married?

A. I am not positive. I think I remember it. I remember the circumstances. As to the likeness I am not positive.

Q. Do you know how those photographs got on that certified copy there? A. I do not.

Q. You cannot now swear that those persons whose photographs are attached to that marriage license are the persons who were married in your presence?

A. It seems to me that that woman looks like the person that was there that day but as to the man I could not say positively. I do not remember because I only saw them at that time.

Q. You never have seen him since, and never saw him before? A. No, sir.

Q. How about the woman. Ever saw the woman before, or since?

A. No, sir, only that one time.

Q. And you say your connection with it was, that Mr. Philip M. Walsh—he is an attorney?

A. Yes, sir.

Q. —sent for you and told you to arrange this marriage, to go to the County Clerk and get a license?

A. He was there himself.

The COURT.—He asked him to go to the County Clerk's office to interpret?

(Testimony of Jee Gam.)

The WITNESS.—Yes.

Mr. McGOWAN.—We offer this marriage license and certificate of marriage in evidence. It is properly certified as being a copy of the marriage license and certificate, which certificate also covers the photographs which were annexed to the original license.

Mr. McKINLEY.—Objected to as not being sufficiently identified.

The COURT.—Is the husband here?

Mr. McGOWAN.—Yes, he is in court.

The COURT.—I will let it go in, but it will have to be further identified.

Mr. McGOWAN.—Do I understand your Honor to rule that you want further identification, that the petitioner in this matter—

The COURT.—That the individuals married are the same as named in that certificate.

Mr. McGOWAN.—That bears the seal of the recorder of Alameda county. It is part of the certificate itself.

The COURT.—The recorder is not called on to certify to the attaching of any photograph. A certificate of a fact of that kind by an officer, which is not within the province of his duty, has no legal significance at all. An officer cannot certify so as to make it a fact to anything that the law does not call on him to certify to.

Mr. McGOWAN.—That is perfectly true, but where a marriage license is issued bearing the photographs of the contracted parties that are placed on

the license at the time of its issuance, and it is then taken before a Justice of the Peace who, in addition to other requirements of the license, to satisfy him as to the identity of the parties to whom the marriage license was issued, has annexed to it photographs showing just who the parties are, it would seem to me it would preclude any question as to the identity of the parties married.

The COURT.—Is there any provision under the law for any such fact as that?

Mr. McGOWAN.—There is nothing to prohibit its being done.

The COURT.—That is not the question. It is the question of what he can certify.

Mr. McGOWAN.—There is no provision of the law which says what they shall not certify to.

The COURT.—No, but it is a question of how you will prove a fact, and this certificate is valueless to prove the fact. You can prove it by other evidence, who they were. I do not think it is a proper method of proving the identity at all.

Mr. McGOWAN.—We can prove it by the husband himself.

The COURT.—It is only a question of the method of proving. You are not precluded from proving the fact.

Petitioner's Exhibit No. 1.

COUNTY OF ALAMEDA, STATE OF CALIFORNIA.

MARRIAGE LICENSE.

These Presents are to Authorize and license any Justice of the Supreme Court, Justice of the Appellate Court, Judge of the Superior Court, Justice of the Peace, Judge of any Police Court, City Recorder, Priest, or Minister of the Gospel of any denomination, to solemnize within said County the Marriage of Wong Heong, native of California aged 29 years, resident of Oakland, County of Alameda, State of California and Wong Chun native of California aged 22 years resident of Oakland, County of Alameda, State of California, Color Mongolian. Said parties being of sufficient age to be capable of contracting Marriage.

[Seal] [Attached hereto are photos of Wong Heong and Wong Chun.]

In Witness whereof I have hereunto set my hand and affixed the Seal of the Superior Court of said County, this 28 day of October, A. D. 1908.

JOHN P. COOK,

County Clerk and Ex-officio Clerk of the Superior Court in and for said Alameda County.

By A. E. Johnstone,

Deputy Clerk.

State of California,
County of Alameda,—ss.

I hereby certify, that I believe the facts stated in the within and above license to be true, and that

upon due inquiry there appears to be no legal impediment to the marriage of said Wong Heong and Wong Chun that said parties were joined in Marriage by me on the 28th day of October, 1908, in Oakland said County and State, that Philip M. Walsh a resident of Oakland, County of Alameda, State of California and Gee Gam a resident of Oakland, County of Alameda, State of California, were present as witnesses of said ceremony.

I have hereunto set my hand this 28 day of October, A. D. 1908.

JAMES G. QUINN,
Justice of the Peace.

State of California,
County of Alameda,—ss.

I, A. K. Grim, County Recorder in and for Alameda County, do hereby certify that I have compared the annexed and foregoing document with the original record thereof as the same appears in my office, in Liber 43 of Marriage License page 479, and that the annexed and foregoing document is a full, true and correct transcript therefrom, and of the whole of such original record. With photograph.

Witness my hand and official seal hereunto set this 6th day of July, A. D. 1909.

[Seal] A. K. GRIM,
County Recorder.

[Endorsed]: Filed for record at request of James G. Quinn this 31 day of Oct., A. D. 1908, at 14 min. past 10 A. M., and recorded on Book 43 of Marriage Certificates on page 479 records of Alameda County. A. K. Grim, County Recorder.

[Testimony of Wong Heung, for the Petitioner.]

WONG HEUNG, called for the petitioner, sworn.

(Examined through the Official Interpreter.)

Mr. McGOWAN.—Q. I show you this tin-type photograph from the records of the United States District Court in the matter of Wong Heong on Habeas Corpus No. 9479, and ask you if that is a photograph of yourself? A. Yes, sir.

Q. And you are the person described in that record as a native-born citizen of the United States?

The COURT.—You need not ask that.

Mr. McGOWAN.—Q. Has your status as a native-born citizen of the United States been passed on by the District Court?

Mr. McKINLEY.—Objected to as not being the best method of proving such a fact.

Mr. McGOWAN.—The record is in evidence, and we think the question is a proper one.

The COURT.—The objection will be sustained. You are asking him for a conclusion. Let me see this photograph. When does this purport to have been taken?

Mr. McGOWAN.—I think the file mark on the back will show. 1891.

The COURT.—June 26th, 1890. This says "Discharged February 3, 1891."

Mr. McGOWAN.—Yes.

The COURT.—This photograph is marked "Wong Heung, Ocianic, June 26th, 1890."

Mr. McGOWAN.—The picture was taken at the time the detained was surrendered into the custody of the Marshal by the Steamship Company.

(Testimony of Wong Heung.)

Q. Are you married? A. Yes, sir.

Q. I show you this marriage license—

The COURT.—Ask him when he was married and about the circumstances, and then show him the license.

Mr. McGOWAN.—Q. When were you married?

A. Last year.

Q. Where? A. In Oakland.

Q. To whom were you married?

A. Wong Chun.

Q. I show you this marriage license issued to Wong Heung and Wong Chun by the County Clerk of Alameda County, to which is annexed two photographs, and ask you if those are the pictures of yourself and the woman to whom you were married?

A. Yes, sir.

Mr. McGOWAN.—I will make the further offer of this marriage license and certificate of marriage.

The COURT.—You have already put it in evidence. I have already admitted it.

Mr. McGOWAN.—That is all.

Cross-examination.

Mr. McKINLEY.—Q. How long had you known the woman that you married before you married her? A. A month or so.

Q. Who was it that suggested that you marry her? A. The girl chose to be married.

Q. Who was it that suggested to you that you be married to that girl? A. The girl herself.

Q. The girl herself asked you to marry her, do I understand? A. Yes.

(Testimony of Wong Heung.)

Q. Did she tell you why she wanted to marry you?

A. I was acquainted with her, and of course as both of us chose to do it, we got married.

Q. Did any lawyer speak to you about going through a marriage ceremony with this girl?

A. No, sir.

Q. You knew of course that she was under judgment of deportation from the United States at the time, did you? A. No, sir.

Q. You did not know that? A. No, sir.

The COURT.—Q. Where was she living at the time?

A. On Dupont street in San Francisco.

Q. Who with? A. No. 913.

Q. Who was she living with?

A. With her clanspeople.

Q. She was not in custody?

Mr. McKINLEY.—She was on bail. That is how this thing happened to be done. She was on bail.

The COURT.—Q. How long had you known her?

A. A little over a month.

Q. Were you living in San Francisco at the time?

A. Yes, sir.

Q. In what business?

A. I was a laundryman.

Q. Where? A. O'Farrell Street.

Q. How did you come to go to Oakland to be married?

A. For the sake of getting the interpreter there

(Testimony of Wong Heung.)

Q. Don't you know there are lots of Chinese interpreters in San Francisco?

A. Yes, sir, but I wanted him. I wanted that particular interpreter.

The INTERPRETER.—That is referring to whoever the interpreter was.

The COURT.—Q. Did you know that particular interpreter there? A. Yes, sir.

Q. What do you mean by saying you wanted that particular interpreter, whether you knew him or not, whoever he was?

A. Any one would have done, but I was acquainted with him.

Q. Who did you first see when you went to Oakland to have this marriage take place?

A. Bun Foo.

The INTERPRETER.—I understand that to mean "judge."

The COURT.—Q. Judge who?

A. Judge Quinn.

Q. Did you go to Judge Quinn first?

A. I went there with the girl.

Q. Did you see Mr. Walsh? A. Yes, sir.

Q. How did you come to meet Mr. Walsh?

A. He was a lawyer and I asked him to come.

Q. How did you come to go to Mr. Walsh?

A. I asked him to come there and to be a witness, and to be my lawyer.

Q. I did not ask you what you asked Mr. Walsh. I asked you how you came to go to Mr. Walsh?

A. To get him to be a witness and being a lawyer.

(Testimony of Wong Heung.)

Q. Did you know Mr. Walsh before you went over there? A. Oh, yes.

Q. How long? A. About a year or so.

Q. When did you first become acquainted with him? A. A little over a year.

Q. Where? A. Oakland.

Q. What was he doing in Oakland?

A. A lawyer.

Q. What were you doing in Oakland when you first met Mr. Walsh?

A. I was arrested for the lottery business and Walsh was my attorney for my defense.

Q. Where? A. In Oakland.

Q. How long had you been living in Oakland?

A. About a year or so before I was arrested.

Q. How long have you been in San Francisco?

A. Some times here, and some times over there.

Q. Are you not directly engaged in the laundry business?

A. Some times I work at it and some times I do not.

Q. You do not run a laundry of your own?

A. No, sir.

Q. How old are you? A. Forty.

Q. What year were you born?

A. The ninth year of Tung Gee (about 1870).

Q. If you are forty years old, then you were born in 1869.

The INTERPRETER.—They count a year different from us. It would mean 39 according to our calculations.

(Testimony of Wong Heung.)

The COURT.—Let me see that report and judgment of the Commissioner. (The paper was handed to the Court.)

This photograph looks to me at least ten years older than this man is now.

Mr. McGOWAN.—That is the photograph of the petitioner in that case, on whose behalf it was taken out.

The CLERK.—This is the photograph (handing).

The COURT.—Q. How old were you when this photograph was taken? A. Twenty-one.

Q. I want you to tell me why you went to Oakland to have this marriage performed instead of going to the County Clerk's office here in the City and County where you live?

A. Because at the time I had been arrested I had got acquainted with Mr. Walsh, and I was not acquainted with lawyers in this city.

Q. You knew enough to know that you did not need any lawyer to enable you to get married?

A. There must be a witness.

Q. You knew you did not need a lawyer as a witness? A. Oh, yes, anybody would do.

Q. Then tell me why you went across the bay to Oakland to get married instead of getting married here in San Francisco.

A. Because I knew the lawyer over there.

The COURT.—Mr. McGowan, I do not know what other witnesses you may have, but this one does not satisfy me of the bona fides of this marriage.

Mr. McGOWAN.—Does your Honor mean with respect to the identity of the persons?

The COURT.—I mean the purpose for which this marriage was had. The mere fact of going through a marriage ceremony is not sufficient to evade the effect of this judgment. Have you any other witness?

Mr. McGOWAN.—No. The proposition is simply this, that every legal presumption is in favor of the validity of the marriage.

The COURT.—That is true ordinarily, but not in the face of a judgment of this kind. I am not satisfied so far that this marriage was not simply for the purpose of evading it.

Mr. McGOWAN.—Your Honor has laid particular stress on the fact that this man went to Oakland, and went to an attorney to get his license. That is a very common thing. I have had numerous applications myself from Chinese to go and get a license for them because they are not acquainted with our customs and ways.

The COURT.—That would not have any weight with me where a man is shown to be a native-born American citizen and have lived here all his life. They are acquainted with our ways. They are a very acute race of people, and know precisely what is going on around them. It is a singular thing to me that this man has never acquired the English language having lived here for a period of upwards of forty years.

(Testimony of Philip M. Walsh.)

Mr. McGOWAN.—If your Honor will continue the matter until to-morrow morning, we will present further evidence.

The COURT.—You must produce it here to-morrow.

Mr. McGOWAN.—We will have it here at that time.

[Testimony of Philip M. Walsh, for the Petitioner.]

Thursday, July 15th, 1909.

PHILIP M. WALSH, called for the petitioner, sworn.

Mr. McGOWAN.—Q. What is your occupation?

A. Attorney at law.

Q. And your residence?

A. Oakland, California.

Q. Do you know the petitioner in this case, the lady sitting there? (Pointing.)

A. I don't know as I would recognize the young lady. I think I have seen her once.

Q. And this Chinese sitting here? (Pointing.) A. I know that person.

Q. I will ask you if you know anything about the marriage of this party on the 28th day of October?

Mr. McKINLEY.—Which party?

Mr. McGOWAN.—The Chinese man in court.

A. Yes, sir, I do.

Q. Just relate to the court what you know about it.

A. The day prior to the marriage of these parties this individual sitting behind me came to my

(Testimony of Philip M. Walsh.)

office accompanied by, I think, another Chinese and requested me to go to the County Clerk's office with him in order that he might procure a marriage license. I had known this individual I presume, for about a year, or a year and a half, having defended him in some matters in which he was interested. The day that he called, for some reason which I do not recall now, I was unable to accompany him to the County Clerk's office, but I made an appointment to meet him either the next forenoon or the next afternoon—I think it was in the afternoon—telling him to meet me at the County Clerk's office. I kept the appointment with him at the County Clerk's office. He was standing outside of the County Clerk's office with a woman who, I think is this woman present, and also with him was the official interpreter of the Alameda County courts, a person named Jee Gam. I brought or accompanied this person into the County Clerk's office, introduced him to Mr. Johnson, the deputy County Clerk, and a marriage license was issued to him. Thereupon I walked with him to the court of Justice Quinn at the corner of Eighth and Broadway, where this individual and the woman that I presume was this woman, were married. That is about all that I know about the matter.

Q. Did you know at that time, or was anything said to you about this woman being under an order of deportation? A. No, sir.

Q. You know nothing at all about that?

A. Nothing whatever. I had never seen the woman before this day.

(Testimony of Philip M. Walsh.)

Q. You have had occasion, Mr. Walsh, to get other marriage certificates for Chinese?

Mr. McKINLEY.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—I do not see the materiality of it.

Cross-examination.

Mr. McKINLEY.—Q. That was the first time you had ever seen this woman at all?

A. To the best of my recollection that was the first time I had ever seen her.

Q. You are not certain now that she is the person?

A. I am quite positive she is the person.

Q. Did the Chinese man say anything to you in regard to marriage? Did he make any other statement to you except as you have stated here, that he wanted you to go to the County Clerk's office to get the marriage license?

A. That is all the statement he made.

Q. You knew nothing about the circumstances under which he met the girl?

A. Nothing whatever.

Q. And you knew nothing about his reasons for contracting the marriage?

A. Nothing whatever.

Q. Did you have any talk with any other person in connection with it either before that time or since that time, as to the object of the marriage?

A. No, sir.

[Testimony of Wong Heong, for the Petitioner (Recalled).]

WONG HEONG, recalled.

The COURT.—Q. What did you say your age was? A. Forty.

The INTERPRETER.—That would be thirty-nine.

The COURT.—Q. Did you apply personally for this marriage certificate to the County Clerk?

A. I went with my lawyer.

Q. Did you give your age at that time?

A. I said at that time I was 39.

Q. The age expressed in this certificate is 29?

A. It must be that the one who interpreted it must have made a mistake.

Q. You gave your age at that time as 39?

A. Yes, sir.

Q. When was that?

A. Last year; that is, last Chinese year; beginning of the tenth month of last year.

[Testimony of Mrs. Wong Heong, for the Petitioner.]

Mrs. WONG HEONG, called for the petitioner, sworn.

The COURT.—I wish to ask her a few questions first.

Q. Do you speak English?

The INTERPRETER.—She says Ung Shik; that is, "I don't know." It is Chinese for "I don't know"; but she gave the English word "talk."

(Testimony of Mrs. Wong Heong.)

Mr. McGOWAN.—Q. You are the petitioner in this case? A. Yes, sir.

Q. When were you married?

A. The tenth month of last year.

Q. Where were you married?

A. In Oakland.

Q. Is this your husband seated back here? (Pointing.) A. Yes, sir.

Q. That is the man to whom you were married at that time? A. Yes, sir.

Q. I show you this marriage license and ask you if the photographs annexed to it are of yourself and your husband.

A. One is mine and the other is my husband's.

Q. Where have you been living since your marriage?

A. In San Francisco, on Sacramento Street.

Q. Who have you been living with?

Mr. McKINLEY.—I object to the question as leading.

A. With my husband.

Mr. McKINLEY.—I will withdraw the objection.

Q. Why did you marry your husband?

A. Because I chose to.

Q. What were your reasons for doing it?

A. Because both of us chose to; it was mutual in other words.

Q. And you have been living together as husband and wife since your marriage?

Mr. McKINLEY.—Objected to as leading.

(Testimony of Mrs. Wong Heong.)

The COURT.—The objection is sustained. It calls for a legal conclusion.

Mr. McGOWAN.—Q. With whom have you been living since your marriage? A. My husband.

Cross-examination.

Mr. McKINLEY.—Q. How long had you known your husband before you were married to him?

A. A little over a month.

Q. Where had you met him?

A. While visiting on Dupont Street. With a friend I saw him.

Q. Was he living in San Francisco at that time, a month before you were married to him?

A. He was on some white man's street in a laundry.

Q. In San Francisco?

A. I don't remember that.

Q. You do not remember whether the man was living in San Francisco?

A. He was in San Francisco.

Q. And you were living in San Francisco during that time? A. Yes, sir.

Q. What occupation were you engaged in in San Francisco? A. I was living on Dupont street.

Q. What occupation were you engaged in?

A. I was not employed getting money.

Q. In what occupation were you engaged at the time of your arrest on this charge of being unlawfully in the United States?

Mr. McGOWAN.—Objected to as incompetent, irrelevant and immaterial.

(Testimony of Mrs. Wong Heong.)

The COURT.—Which charge?

Mr. McKINLEY.—The charge of being unlawfully in the United States.

Mr. McGOWAN.—Her status at that time had been completely passed upon and determined.

The COURT.—I overrule the objection.

A. I do not chose to answer.

Q. Why don't you choose to answer?

A. Because I don't choose to.

Q. How long did you follow that occupation?

The COURT.—Tell her, Mr. Interpreter, she must answer.

A. I don't know what that amounts to or means.

The COURT.—You must answer the question.

Mr. McGOWAN.—Tell her to obey the instructions of the Court and answer the question.

A. I was a seamstress.

Mr. McKINLEY.—Q. Did you do anything else?

A. Nothing.

Q. Why don't you choose to answer that question? A. Because I did not choose to.

Q. Is it not a fact that you were arrested in a Chinese house of prostitution in this city?

Mr. McGOWAN.—That is incompetent, immaterial, irrelevant and has no bearing on any issue in this case. That phase of this matter has been gone into and examined into before Judge Heacock and again before Judge DeHaven, and is totally foreign to anything involved in this case. The status at this time is simply that of a wife of a citizen, if she is bona fide his wife.

(Testimony of Mrs. Wong Heong.)

The COURT.—Q. How long after her arrest was it that she was married?

Mr. McKINLEY.—She was arrested some time in 1906, and the marriage did not take place until, according to the pleadings here in this matter, some time late in October, 1908.

Mr. McGOWAN.—About a year and half afterwards.

Mr. McKINLEY.—While the proceedings in this Court in reference to the findings and judgment of the Commissioner were pending.

The COURT.—How long after she was adjudged to be deported was it that she married?

Mr. McGOWAN.—That I could tell by reference to the petition and papers on file here. I think the petition shows that the Commissioner's findings upon that subject, and his judgment, were signed on the 27th day of September, 1907. That is the date of the finding of the petitioner and the petition also shows that that judgment was affirmed on the 7th day of February, 1905, by Judge De Haven in the District Court.

Mr. McGOWAN.—The judgment in the Circuit Court of Appeals I think probably was in May of this year.

Mr. McKINLEY.—I think it was before that.

The COURT.—When did the marriage take place?

Mr. McGOWAN.—October of last year.

The COURT.—Before the judgment of the Circuit Court of Appeals?

(Testimony of Mrs. Wong Heong.)

Mr. McKINLEY.—Yes, but after all the other judgments.

The COURT.—I think the question is relevant as bearing on the question of good faith in this marriage, and whether it was intended to evade the necessity of being deported, I overrule the objection.

Mr. McGOWAN.—I will take an exception.

A. I don't know that place.

Mr. McKINLEY.—Q. What do you mean by saying that you don't know that place?

A. I don't choose to tell.

Q. You don't choose to tell. At the time you met your husband, were you following the same occupation that you were at the time of your arrest?

A. When?

Q. I think my question is definite enough.

The COURT.—Read the question, Mr. Reporter.

The INTERPRETER.—I remember the question.

A. I don't understand. I don't choose to say.

Mr. McKINLEY.—It seems to me that these questions ought to be answered.

Q. At whose suggestion was the marriage between yourself and your husband entered into or carried out. At whose suggestion was the marriage ceremony performed between yourself and your husband? A. I choosed to.

Q. Were you the one that suggested it to your husband or to the man whom you afterwards married?

A. The two of us together. One chose the other.

(Testimony of Mrs. Wong Heong.)

Q. Did anybody suggest to you that it would be well for you to enter into a marriage with him?

A. It was a mutual matter between the two of us.

The COURT.—Q. Mr. McKinley asked you if the idea of getting married was suggested by anybody to you. Answer that question.

A. No, sir.

Q. How long had you been in the country when you were married? A. I was born here.

Q. Do you understand what "born in the country" means?

A. My mother gave me birth here.

Q. You did not come here from China then?

A. I don't know that matter or that affair.

Q. Don't you know whether you came to this country from China or not?

A. I don't know about that.

Mr. McGOWAN.—I will state to the Court under these deportation proceedings the statute raises the presumption adverse to the person then before the Commissioner.

The COURT.—I understand, but what has that to do with this?

Mr. McGOWAN.—The finding is that she was born in China. All of the testimony before the Commissioner was to the effect that she was born here. The weight of the testimony was not sufficient to convince the Commissioner.

Mr. McKINLEY.—The finding of the Commissioner is that she was not born here, and was born in China, and the Circuit Court of Appeals has said the same too.

(Testimony of Mrs. Wong Heong.)

The COURT.—When did the findings show that she was born? How old is she?

Mr. McKINLEY.—I will read that portion of the Commissioner's findings: "That the defendant is a Chinese person, and at all times during her residence in the United States has been, and now is a manual laborer within the true intent and meaning of the Chinese exclusion Act," etc. And that on the day mentioned she was found in this State and District without the certificate of residence required, etc. "I further find that the defendant was not born within the United States, and as a conclusion of law I find that the defendant is unlawfully in the United States."

The COURT.—Q. How old are you?

A. 23.

Q. Where were you born? What part of the United States? A. San Jose.

Q. Are your parents living?

A. My mother is, but my father is dead.

Q. When did you come to San Francisco first?

A. When my father was sick, I ran away with a man from San Jose.

Q. How long ago was that?

A. When I was eighteen.

Q. Did you live with him?

A. Yes, sir, I lived with him after I came from San Jose to San Francisco.

Q. For how long?

A. Well, not very long, when he went to work and I did not see him again.

Q. Then what did you do?

(Testimony of Mrs. Wong Heong.)

A. I did sewing and cooked for a living.

Q. Where did you do sewing?

A. I don't remember the street it was on.

Q. You know who you did sewing for?

A. I assisted people to sew.

Q. To sew what?

A. Just assisted in making clothing.

Q. What kind of clothing, and where was it?

A. Clothing for men. I don't remember now the place where it was.

Q. What kind of clothing. Was it trousers, or coats, or what?

A. Anything they had to do.

Q. Now, I want you to tell me what kind of clothes you were engaged in sewing upon. Anything they had to do is not a sufficient answer.

A. Both coats and pants.

Q. How long were you engaged in that?

A. Sometimes I would work for a day. Sometimes I would work for a day or more. I could not say exactly.

Q. How many days in a month?

A. Well, if I was diligent I would do more. If I was not diligent I would not do so much.

Q. That is not an answer to my question. I asked you how many days a month you worked?

A. About forty days a month.

Q. You were born in the United States, you say?

A. Yes, sir.

Q. Have you ever been to school here?

(Testimony of Mrs. Wong Heong.)

A. My mother was poor and my father, and I never studied.

Q. How does it come that you never have learned to speak the English language?

A. I did not choose to study.

Q. But you were running around the streets in company with lots of little children that were of English parentage, were you not?

A. I was around San Jose. I was born in San Jose and I would hear some English, but I did not choose to learn.

Q. How long have you been living in San Francisco, now, up to this time?

A. About a month or so after I was married I came over here.

Q. A month or so after you were married?

A. Yes, sir.

Q. Where were you living when you were married? A. On Dupont Street.

Q. What do you mean by saying "about a month or so after I was married I came over here"?

A. It was after I was married, then I came over here.

Q. Where were you living when you were married? If you came over here after your marriage where *you* you living when you were married?

A. I went over there and was married and after I was married I came immediately back here.

Q. Why did you go to Oakland to get married?

A. I don't know. I went where my husband wanted me to.

(Testimony of Mrs. Wong Heong.)

Q. Did you ask your husband to marry you?

A. I was the one who first proposed.

Q. You were the one who first proposed. What was your idea in proposing marriage to him?

A. Because I choose it.

Q. How long had you known him?

A. About a month or a little over.

Q. How often had you seen him before that?

A. I could not say how many times, but we had gone to the park and taken walks in the street and so on.

Q. You do not know why you were taken over to Oakland to be married?

A. I don't know.

Testimony closed.

That the matter was thereupon argued by counsel for the respective parties thereto, and submitted upon briefs to be thereafter filed, and the case to be upon the filing of said briefs then submitted to the Court for its decision.

That the said Court did thereafter decide said matter dismissing the order to show cause why a Writ of Habeas Corpus should not issue, and denying the application for a Writ of Habeas Corpus as prayed for in said petition, and that the opinion of the Court as delivered in said matter is as follows:

[Opinion in Bill of Exceptions.]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEONG, on Application for a Writ of Habeas Corpus.

McGOWAN and WORLEY, for Petitioner.

ROBERT T. DEVLIN, United States Attorney, GEORGE CLARK, Asst. United States Attorney, for Respondent.

VAN FLEET, District Judge.

In this matter heretofore heard and submitted before me upon an order to show cause why a Writ of Habeas Corpus should not issue, I find from a consideration of the evidence introduced at the hearing that all the allegations contained in the answer of the respondent, C. T. Elliott, as Marshal for this District are true; and I further find that the marriage of said petitioner to Wong Heong, as set forth in the petition and referred to in the answer of respondent, was not entered into in good faith, but was a mere sham, pretense and form, had and entered into between petitioner and the said Wong Heong solely with the purpose and intent of evading the effect of the findings, judgment and order of deportation theretofore had and then existing against said petitioner as alleged in said petition and answer, and to enable the said petitioner to remain within the United States, notwithstanding the existence of said order or deportation.

From these facts I conclude that said pretended marriage did not effect a change in the legal status of petitioner as it existed at the date the same was entered into, nor avoid the effect of the judgment and order of deportation aforesaid. Upon the foregoing facts and conclusions I hold that, within the principles of Looe Shee vs. North, 170 Fed. 566, and the cases there cited, the petitioner is not entitled to a writ of Habeas Corpus. The order to show cause is therefore discharged and the application denied.

Wherefore, the petitioner, Mrs. Wong Heong, presents the foregoing Bill of Exceptions and prays that the same may be settled and allowed.

Dated, San Francisco, Cal., September 10th, A. D. 1909.

McGOWAN and WORLEY,
Attys. for Petitioner.

[Order Approving, etc., Bill of Exceptions.]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEONG, for a Writ of Habeas Corpus.

CERTIFICATE OF SETTLEMENT.

The foregoing Bill of Exceptions being duly prepared and presented by the petitioner and appellant, for the settlement within due and legal time, and in due and proper manner, and in all respects accord-

ing to law, I hereby certify that the foregoing Bill of Exceptions is full, true and correct, and contains all the evidence and proceedings in the case, and the same is approved and settled by me as the Bill of Exceptions in said matter.

Dated, San Francisco, California, Oct. 6th, A. D. 1909.

W. C. VAN FLEET,

United States District Judge Presiding in the Circuit Court of the United States, Ninth Circuit, Northern District of California.

The foregoing Bill of Exceptions is hereby certified to by us as correct.

Dated, San Francisco, California, September 30, A. D. 1909.

McGOWAN & WORLEY,

Attys. for Petitioner and Appellant, Mrs. Wong Heong.

BENJ. L. McKINLEY,

Asst. United States Atty Appearing for and on Behalf of the United States Marshal.

Received the within proposed Bill of Exceptions and service admitted thereof this 11th day of September, A. D. 1909.

BENJ. L. McKINLEY,
Asst. United States Attorney.

[Endorsed]: Filed Oct. 6, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the above-entitled court, and to Hon. Robt. T. Devlin, Esq., United States Attorney, and to the Hon. C. T. Elliott, United States Marshal in and for the Northern District of the State of California:

You and each of you will please take notice that the above-named Mrs. Wong Heung, who previous to her marriage was known as Wong Chun, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order made and entered on the 31st day of August, A, D. 1909, dismissing the order to show cause heretofore in said matter issued, and denying the application for a Writ of Habeas Corpus herein.

Dated, San Francisco, Cal., September 2d, 1909.

McGOWAN and WORLEY,
Attys. for Mrs. Wong Heung.

Service of the within Notice of Appeal and receipt of a copy thereof is hereby admitted this 2d day of September, A. D. 1909, at San Francisco, California.

ROBT. T. DEVLIN,
United States Attorney.
C. T. ELLIOTT,
United States Marshal.
By Geo. H. Burnham,
Chief Office Deputy.

[Endorsed]: Filed Sept. 2, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

Petition for Appeal.

To the Honorable W. C. VAN FLEET, United States District Judge, Presiding in the United States Circuit Court, Ninth Circuit, Northern District of California:

Mrs. Wong Heung, before her marriage known as Wong Chun, feeling herself aggrieved by the order and judgment of this court, made and entered herein on the 31st day of August, 1909, dismissing the order to show cause and denying the petition for a Writ of Habeas Corpus petitioned for in the above-entitled matter, and dismissing the proceedings thereunder, does hereby appeal to the Circuit Court

of Appeals, for the Ninth Circuit, from such judgment, order and decree, and from each and every part thereof; and the said Mrs. Wong Heung prays that this petition for her appeal may be allowed, and that a transcript of the proceedings and papers upon which said judgment and order was made and issued duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit; and petitioner further prays that the custody of the said Mrs. Wong Heung be not disturbed or changed during the pendency of this court, unless by order of this court, or the appellate court.

Dated, San Francisco, Cal., September 3d, 1909.

McGOWAN and WORLEY,
Attys. for Petitioner.

Service of the within Petition for Appeal, and receipt of a copy thereof is hereby admitted this 3d day of September, A. D. 1909, at San Francisco, California.

ROBT. T. DEVLIN,
U. S. Attorney.

[Endorsed]: Filed September 3, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

Assignment of Errors.

Now comes Mrs. Wong Heung, before her marriage known as Wong Chun, and files the following assignment of errors upon which she will rely on her appeal taken this 2d day of September, 1909, from the order and judgment made by this Court on the 31st day of August, 1909, denying her petition for a Writ of Habeas Corpus.

I.

That the said Circuit Court erred in denying and in not granting the petition filed by the said Mrs. Wong Heung for a Writ of Habeas Corpus.

II.

That the said Circuit Court erred in holding that the marriage entered into between Wong Heung and Mrs. Wong Heung, before her marriage known as Wong Chun, was a sham, pretext and fraud entered into for the purpose of evading the order of deportation previously made and entered against Mrs. Wong Heung.

III.

That the said Circuit Court erred in holding that the said Mrs. Wong Heung was not entitled to be discharged from custody on the ground that she is the lawful wife of a native-born citizen of the United States, and erred in not discharging her from custody on said ground.

IV.

That the finding of the said Circuit Court that the marriage entered into between Mrs. Wong Heung

and Wong Heung was a sham, pretext and fraud entered into for the purpose of defeating and evading the order of deportation previously entered against the said Mrs. Wong Heung and is contrary to the evidence.

V.

That the finding of the said Circuit Court that the marriage entered into between Mrs. Wong Heung and Wong Heung, was a sham, pretext and fraud entered into for the purpose of defeating and evading the order of deportation previously entered against the said Mrs. Wong Heung and is not supported by the evidence.

Dated, San Francisco, Cal., Sept. 2d, 1909.

McGOWAN and WORLEY,
Attys. for Wong Chun.

Service of the within assignment of errors, and receipt of a copy thereof is hereby admitted this 3d day of September, A. D. 1909, at San Francisco, California.

ROBT. T. DEVLIN,
U. S. Attorney.

[Endorsed]: Filed September 3, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

Order Allowing Appeal.

Mrs. Wong Heung, having presented to this court in open session on the 3d day of September, A. D. 1909, her petition on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order made and entered by this court on the 31st day of August, 1909, refusing and denying the Writ of Habeas Corpus prayed for by her own behalf, and dismissing all proceedings under said petition, and having presented to the Court at the same time an assignment of errors, and having by her counsel moved the Court for an order allowing said appeal, and staying proceeding during the pendency of this appeal,—

It is hereby ordered that the said appeal be and the same is hereby allowed; and further that a certified transcript of all the record and all the proceedings be prepared and transmitted by the clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit, in the time prescribed by law; and it is further ordered that the custody of the said Mrs. Wong Heung be not disturbed or changed unless by order of this court or the Appel-

late Court; and it is further ordered that a copy of this order be served upon C. T. Elliott, United States Marshal in and for the Northern District of California, and upon United States Attorney for the Northern District of California.

Done in open court this 3d day of September, A. D. 1909.

WM. C. VAN FLEET,
Judge.

Service of the within order allowing appeal, and receipt of a copy thereof, is hereby admitted this 3d day of September, A. D. 1909, at San Francisco, Cal.

ROBT. T. DEVLIN,
U. S. Attorney.
C. T. ELLIOTT,
U. S. Marshal.
By Geo. H. Burnham,
Chief Office Deputy.

[Endorsed]: Filed September 3, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Certificate of Clerk U. S. Circuit Court to Transcript of Record.]

In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 14,912.

In the Matter of Mrs. WONG HEUNG, on Habeas Corpus.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judi-

cial Circuit, in and for the Northern District of California. do hereby certify the foregoing fifty-four (54) pages, numbered from 1 to 54, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled matter, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $30.00; that said amount was paid by George A. McGowan, attorney for the petitioner; and that the original Citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 26th day of October, A. D. 1909.

[Seal] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Citation (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to C. T. Elliott, U. S. Marshal in and for the Northern District of California, and to Robt. T. Devlin, U. S. Attorney in and for the Northern District of California, His Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty

days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the Northern District of California, wherein Mrs. Wong Heung (on Habeas Corpus) is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 7th day of October, A. D. 1909.

WM. C. VAN FLEET,
United States District Judge.

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 7th day of October, 1909.

BENJ. L. McKINLEY,
Assistant U. S. Attorney for Appellee.

[Endorsement]: No. 14,912. U. S. Circuit Court of Appeals for the Ninth Circuit. Mrs. Wong Heung, on Habeas Corpus, Appellant, vs. T. C. Elliott, U. S. Marshall, Appellee. Citation on Appeal. Filed October 7th, 1909. Southard Hoffman, Clerk U. S. Circuit Court. By W. B. Maling, Deputy Clerk.

[Endorsed]: No. 1791. United States Circuit Court of Appeals for the Ninth Circuit. Mrs. Wong Heung, Appellant, vs. C. T. Elliott, United States Marshal, in and for the Northern District of California, Appellee. In the Matter of the Petition of Mrs. Wong Heung for a Writ of Habeas Corpus. Transcript of Record. Upon Appeal from the United States Circuit Court for the Northern District of California.

Filed November 5, 1909.

F. D. MONCKTON,
Clerk.

No. 1791

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

MRS. WONG HEUNG,
Appellant,

vs.

C. T. ELLIOTT, United States Marshal, in and for the Northern District of California,
Appellee.

In the Matter of the Petition of MRS. WONG HEUNG for a Writ of Habeas Corpus.

APPELLANT'S OPENING BRIEF.

McGOWAN & WORLEY,
Attorneys for Appellant.

Filed this.....day of February, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

FERNAU PUBLISHING CO.

No. 1791

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

MRS. WONG HEUNG,
Appellant,

vs.

C. T. ELLIOTT, United States Marshal, in and for the Northern District of California,
Appellee.

In the Matter of the Petition of MRS. WONG HEUNG for a Writ of Habeas Corpus.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

On August 1st, 1907, Wong Shee was arrested and charged with a violation of the Act of Congress of the United States, entitled: "An Act to prohibit the coming of Chinese persons into the United States," approved May 5th, 1892, and the Act amendatory thereof, approved November 3rd, 1893, and the Act of Congress approved April 29th, 1902.

On September 27, 1907, after a hearing before a United States Commissioner, Wong Chun was or-

dered deported from the United States to China, upon the finding that she, Wong Chun, was a Chinese laborer illegally domiciled within the United States.

On February 7th, 1908, after a hearing on appeal and further evidence being submitted in support thereof, the judgment of the U. S. Commissioner ordering the deportation of Wong Chun from the United States to China, as a Chinese laborer illegally domiciled within the United States, was affirmed.

On October 28, 1908, Wong Chun was united in matrimony to Wong Heung, in the City of Oakland, County of Alameda, State of California (Wong Heung is a native born citizen of the United States, his status as such having been so established in a proceeding known, designated, and entitled, as follows: "In the United States District Court, in and for the Northern District of California, in the matter of Wong Heung, on habeas corpus, No. 9479").

On May 10, 1909, the United States Circuit Court of Appeals for the Ninth Circuit, affirmed the judgment of the United States District Court, ordering the deportation of Wong Chun from the United States as aforesaid.

On July 7, 1909, Wong Chun was taken into custody of the U. S. Marshal for the purpose of deporting her out of the United States to China in compliance with said order of deportation, after the United States District Court had denied a motion in arrest

of judgment based upon the change in her status, occasioned by said marriage, which was then for the first time called to the attention of the court.

On July 8th, 1909, a petition for a writ of habeas corpus was filed by Mrs. Wong Heung, alleging that she is held in the custody of the marshal by a warrant of deportation, dated September 27th, 1907, and affirmed after a hearing upon the facts by the United States District Court, on February 7th, 1908, alleging further that she was at that time a Chinese manual laborer illegally domiciled within the United States, and ordering her deported from the United States to China, which last mentioned judgment was thereafter reviewed and affirmed by the United States Circuit Court of Appeals. The petitioner claims that she is illegally held in custody because since the finding by the United States Commissioner and the United States District Judge, as aforesaid, to the effect that she was then a Chinese person illegally domiciled within the United States, her status has since been changed by her marriage, as aforesaid, to that of a person lawfully and legally domiciled within the United States, and is therefore permitted under our laws to take up her residence with and remain in the company of her husband, who is a native born citizen of the United States.

Thereafter a demurrer was filed and taken under submission by the court after being argued by counsel, and an order to show cause why a writ of habeas corpus should not issue was made, and thereafter

a return to said order was filed, and a hearing had on the merits of the case, from which it appeared:

First. That Wong Heung is a native born citizen of the United States.

Second. That Wong Chun was, prior to her marriage, a Chinese woman illegally domiciled in the United States, and under an order of deportation to China.

Third. That Wong Heung and Wong Chun were united in marriage in compliance with the laws of the State of California, in the City of Oakland, County of Alameda, State of California, on the 28th day of October, 1908, and ever since have been and now are husband and wife, and were living together as such, from the time of their marriage until July 7th, 1909, when the wife was taken into custody by the marshal under the said order of deportation.

Thereupon the court found that the marriage of said petitioner to Wong Heung was not entered into in good faith, but was a mere sham, pretense and form, had and entered into between petitioner and the said Wong Heung solely with the purpose and intent of evading the effect of the findings, judgment and order of deportation theretofore had and then existing against said petitioner and to enable the said petitioner to remain within the United States, notwithstanding the existence of said order or deportation.

The order to show cause was thereupon discharged and the application for a writ of habeas corpus denied, and thereafter this appeal was perfected.

Specification of Errors.

I.

That the said Circuit Court erred in denying and in not granting the petition filed by the said Mrs. Wong Heung for a Writ of Habeas Corpus.

II.

That the said Circuit Court erred in holding that the said Mrs. Wong Heung was not entitled to be discharged from custody on the ground that she is the lawful wife of a native-born citizen of the United States, and erred in not discharging her from custody on said ground.

III.

That the said Circuit Court erred in holding that the marriage entered into between Wong Heung and Mrs. Wong Heung, before her marriage known as Wong Chun, was a sham, pretext and fraud entered into for the purpose of evading the order of deportation previously made and entered against Mrs. Wong Heung.

IV.

That the finding of the said Circuit Court that the marriage entered into between Mrs. Wong Heung

and Wong Heung was a sham, pretext and fraud entered into for the purpose of defeating and evading the order of deportation previously entered against the said Mrs. Wong Heung and is contrary to the evidence.

V.

That the finding of the said Circuit Court that the marriage entered into between Mrs. Wong Heung and Wong Heung, was a sham, pretext and fraud entered into for the purpose of defeating and evading the order of deportation previously entered against the said Mrs. Wong Heung and is not supported by the evidence.

For convenience in presenting the case the first two assignments will be treated together and the last three assignments will also be treated together.

Argument.

FIRST.

DID NOT THE LOWER COURT ERR IN DENYING THE WRIT AND IN REFUSING TO DISCHARGE THE DETAINED AS THE WIFE OF A CITIZEN OF THE UNITED STATES?

Wong Heung's status as a citizen of the United States has been judicially determined, and the law is well settled that a citizen can not be excluded from the United States, so Wong Heung's right to remain therein is unassailable.

U. S. v. Wong Kin Ark, 169 U. S., 649;
Lee Sing Far v. U. S., 94 U. S. 834.

It is the law that the wife and children of Chinese members of the "exempt classes" are permitted to enter and remain in this country, because the domicile of the wife and children is that of the husband and father.

U. S. v. Gue Lim, 176 U. S., 468.

It is undoubtedly the law that a citizen of the United States is entitled to the society and company of his wife, and that she is entitled to enter the United States, and remain therein with husband.

Tsoi Sim v. U. S., 116 Fed. 925; 54 C. C. A. Rep. 159;

Hopkins v. Fachant, 130 Fed., 839.

Quoting from the Tsoi Sim decision, supra, we find the following:

> "Upon what method of legal reasoning can it be held that the wife of an American citizen is not entitled to the same rights, privileges and immunities under the law? A Chinese merchant does not stand upon a higher plane than a Chinaman who is born of parents of Chinese descent, having a permanent domicile and residence in the United States. On the contrary, the native born, by virtue of his citizenship becomes a citizen of the United States, and is entitled to greater rights and privileges than an alien merchant. The wife has the right to live with her husband; enjoy his society; receive his support and maintenance and all the comforts and privileges of the marriage relation. These are her as well as his natural rights. By virtue of her marriage, her husband's domicile becomes her domicile, and therefore she was entitled to live with her husband and remain in this country."

That the domicile of the husband is the domicile of the wife, is well settled, and it has been so expressly held in many, many cases in the highest courts of the United States, as well as the highest court of probably every state in the union.

This brings us to a study of the wife's status; admittedly before her marriage she was illegally domiciled within this country, and was not only subject to deportation, but was actually under an order of deportation. While in this condition she became the wife of an American citizen. The Circuit Court of Appeals for this district, in the Tsoi Sim case, supra, decided as follows:

> "Whatever effect her error of omission in failing, during the few years of infancy, to obtain a certificate of registration, if any she was entitled to, it certainly did not deprive her of the right to marry an American citizen lawfully domiciled in this country. This she did. By this act, her status was changed from that of a Chinese laborer to that of a wife of a native born American. Her husband is not before the court, but his rights as well as hers are involved."

It will be seen from this extract that the only distinction in this respect between the Tsoi Sim case, and the case at bar, is that Tsoi Sim was simply *illegally* in the country, whereas the petitioner had been *adjudged to be illegally* within the country.

Following further the decision in the Tsoi Sim case, supra, we find the following:

> "Conceding that, by applying the literal language of the statute, it might be found that she

> could be deported, yet is it not evident that such a construction would necessarily lead to absurd results without benefit to the United States? The object and intent of the law was to deport Chinese not entitled to remain. If appellant was to be deported, she would have the unquestioned right to immediately return, and would be entitled to land, and remain in this country upon the sole ground that she is the lawful wife of an American citizen."

The sole distinction between the Tsoi Sim case and the case at bar, in this respect, as stated above, would therefore seem to be that the former was *illegally* in the United States at the time of her marriage, whereas the latter had been *adjudged illegally* within the United States at the time of her marriage.

This distinction would seem to be entirely obliterated when we analyze a later decision by the same court in the case of Hopkins v. Fachant, supra, reported in 130 Fed. 839, for in this case it appears that the alien woman was, like this petitioner, not only *illegally* in the United States, but *adjudged illegally* in the United States. The only distinction between the Fachant woman, and this petitioner, is that in the former case the adverse adjudication was by the secretary of the department having charge of the expulsion of undesirable aliens, whereas the adjudication in the case at bar is by one of the United States courts.

We think that in view of the decision of the Supreme Court in the cases of Jue Toy, 198 U. S.

253, and Chin Yow, 208 U. S. 8, which makes the decision of the executive branch of the government final in these matters, that this executive decision is in legal contemplation of equal weight with the adjudication of the court.

If it should be contended, however, that there is a legal distinction between the circumvention of the *executive* order of deportation in the Hopkins v. Fachant case, supra, and in the *judicial* order of deportation in the case at bar, we then invite attention to the case of Tom Hon, reported in 149 Fed. at page 842. In this last mentioned case a judicial order of deportation was circumvented by the procuring of a certificate of registration.

These three cases may be summarized as follows:

> "Tom Hon—under a judicial order of deportation as a Chinese manual laborer, by his own act procured a certificate of registration, which said certificate unless cancelled by a suit in equity, protected his further residence in the United States, notwithstanding that he was judicially adjudged to be illegally resident within the United States.
>
> Blanche Fachant—under an executive order of deportation, by her marriage to a naturalized American citizen protected her future residence within the United States.
>
> Tsoi Sim—a Chinese manual laborer, illegally resident within the United States, protected her future residence within the United States by marriage to a native born American citizen.

It will therefore be seen that every element raised in the case at bar is covered in some one of the above mentioned cases.

SECOND.

THE INTENT WITH WHICH THE MARRIAGE WAS ENTERED INTO AND ITS BONA FIDES.

The finding of the court to the effect that this marriage might have been entered into for the purpose of evading the order of deportation would seem to be covered by the case of Hopkins v. Fachant, supra, in the reply brief filed by the government in that case, you will find, near the end of page nine that the District Attorney made the direct charge that the marriage was entered into for the purpose of evading the warrant of deportation, and it will be seen by reference to page ten in the transcript in that case, where the decision of the District Judge is set forth, and also in the decision of the Circuit Court of Appeals, reported in 130 Fed. 839, that the trial court in that proceeding really took notice of the existence of the marriage from evidence introduced in a case other than that of Hopkins v. Fachant, and in the case of a prosecution, by the government, of Alexander Fachant charging him with bringing the person whom he afterwards married, into the United States for immoral purposes.

It would therefore seem that the question of intention was doubly aggravated in the Fachant case,

in this that the marriage was open to the charge of having been entered into not only for the purpose of evading the order of deportation, but also for its effect upon the jury in the criminal prosecution against Alexander Fachant. Under the circumstances just recited the Circuit Court of Appeals upheld the validity of the marriage.

In concluding this matter, we submit, that the marriage of this petitioner is upheld and maintained by both the husband and wife; that it is in every respect a legal marriage under the laws of the State of California; that the parties lived together as husband and wife thereafter for upwards of eight months and until the wife was taken into custody under the said order of deportation; that it being a lawful marriage under the laws of the State of California, the government of the United States has no alternative but to recognize it as such. The regulation of domestic relations is a power withheld from the government of the United States, and given to the governments of the individual states.

It is the contention of the petitioner in this matter, that her marriage with Wong Heung, while it might have the legal effect of preventing her deportation to China, was not entered into for such purpose.

The legal effect of a marriage by a woman illegally in the United States is summed up in these few words in the decision of the Tsoi Sim case, supra:

> "By this act, her status was changed from that of a Chinese laborer to that of the wife of a native born American."

And as such she is entitled to remain, and we therefore submit that the petition should be granted, and a Writ of Habeas Corpus issued, and the detained restored to her liberty.

Respectfully submitted,

McGowan & Worley,

Attorneys for Appellant.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MRS. WONG HEUNG,

Appellant,

vs.

C. T. ELLIOTT, United States Marshal, in and for the Northern District of California,

Appellee.

In the Matter of the Petition of Mrs. Wong Heung for a Writ of Habeas Corpus.

BRIEF OF APPELLEE.

ROBT. T. DEVLIN, United States Attorney
BENJAMIN L. McKINLEY, Assist. United States Attorney
Attorneys for Appellee

Filed this day of March, 1910.

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.

Phillips & Van Orden Co. 509-515 Howard Street, S. F.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

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By Deputy Clerk.

No. 1791.

In the United States Circuit Court of Appeals for the Ninth Circuit.

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MRS. WONG HEUNG,

Appellant,

vs.

C. T. ELLIOTT, United States Marshal, in and for the Northern District of California,

Appellee.

In the Matter of the Petition of MRS. WONG HEUNG for a Writ of *Habeas Corpus.*

BRIEF OF APPELLEE

Statement of the Case

This is an appeal from an order of the United States Circuit Court for the Ninth Circuit, Northern District of California, from an order made and

entered on August 31, 1909, discharging an order to show cause why the writ of *habeas corpus* should not issue, and denying the application for the writ of *habeas corpus.* (Trans. of Rec. pp. 15-16-17.)

On July 7, 1909, a petition for the writ of *habeas corpus,* signed by "Mrs. Wong Heung," was filed in said court, alleging that petitioner was unlawfully restrained of her liberty by appellee, the United States Marshal for the Northern District of California, and setting forth, as the grounds of the alleged illegality of her imprisonment, the following:

"That it is claimed by the said C. T. Elliott, United States Marshal as aforesaid, that the said Mrs. Wong Heung is held by him and in his custody, under certain findings, judgment and order of deportation, by which he, the said marshal, is directed to deport your petitioner, Mrs. Wong Heung, in such findings, judgment and order described as Wong Chun, from the United States to China, she, your petitioner, having been therein found on September 27th, 1907, the date upon which the findings, judgment and order of deportation was made and entered, to have been a Chinese person illegally domiciled within the United States of America. That said findings, judgment and order of deportation made and entered by E. H. Heacock, United States Commissioner in and for the Northern District of California, on the 27th day of September, 1907, as aforesaid, was ordered affirmed

by the Judge of the District Court of the United States, in and for the Northern District of California, on February 7th, 1908, and said judgment having been thereafter affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, and the mandate thereof spread upon the minutes of the District Court of the United States, in and for the Northern District of the State of California, and your petitioner being upon the 7th day of July, 1909, ordered into the custody of C. T. Elliott, United States Marshal, as aforesaid, in execution of the said findings, judgment and order of deportation, and said order affirming same. The said Marshal now holds your petitioner subject to said findings, judgment and order of deportation and said order affirming same, and intends to execute the same as therein directed. A copy of said findings, judgment and order of deportation and a copy of the order affirming the judgment of United States Commissioner Heacock, are hereunto annexed and marked repectively Exhibit "A" and Exhibit "B."

That in said proceedings your petitioner was charged with "a violation of the Act of Congress of the United States, entitled 'An Act to prohibit the coming of Chinese persons into the United States,' approved May 5th, 1892, and of the Act amendatory thereof, approved November 3d, 1893, and the Act of Congress, approved April 29th, 1902."

Your petitioner alleges that upon the 31st day of July, 1907, the day of the arrest of your petitioner in said deportation proceedings; that upon the 27th day of September, 1907, the date of the said findings, judgment and order of deportation, and upon the 7th day of February, 1908, the date of the said order affirming the judgment of the United States Commissioner, your petitioner was according to the orders of the United States Commissioner, and the Judge of the District Court of the United States for the Northern District of California, a Chinese laborer unlawfully domiciled within the United States, and as such was subject to deportation from the United States.

Your petitioner alleges that her status as a Chinese person illegally within the United States has, since said last mentioned date, been changed to that of a person lawfully domiciled and resident within the United States, for the reason that upon the 28th day of October, 1908, your petitioner was united in matrimony to Wong Heung, in the city of Oakland, county of Alameda, State of California. That the said Wong Heung is a native-born citizen of the United States of America, and his status as such was the subject of judicial investigation, and was so determined in the proceedings known, designated and entitled as follows, to wit: "In the District Court of the United States, Northern District of California,

In the Matter of Wong Heung, on *Habeas Corpus,* No. 9479."

Therefore, your petitioner alleges that by said marriage her status was changed from that of a Chinese person illegally resident within the United States, to that of the wife of a native-born citizen of the United States, and that as such she is entitled to remain and reside within the United States, notwithstanding said findings, judgment and order of deportation, and order affirming the same."

A copy of the findings, order and judgment of deportation of the United States Commissioner is attached to the petition as "Exhibit A." (Trans. Rec. pp. 5-6.)

By reference to it we see that the Commissioner found as follows:

"That the defendant is a Chinese person, and at all times during her residence in the United States has been, and now is, a manual laborer within the true intent and meaning of the Chinese exclusion acts; that on the 31st day of July, 1907, she was found within the State and Northern District of California, without the certificate of residence required by Section Six of the Act of Congress, entitled "An Act to prohibit the coming of Chinese persons into the United States," approved May 5th, 1892, and the acts amendatory thereof, and she has not clearly established to my satisfaction that by reason of acci-

dent, *sickness, other* avoidable cause, she has been unable to procure such certificate of residence. I further find that the defendant was not born within the United States.

And as a conclusion of law, I find that the defendant is unlawfully in the United States, and is not lawfully entitled to be in and remain therein.

It is, therefore, ordered, adjudged and decreed that the defendant, Wong Chun, be deported from the United States to China; and it is further ordered that she be committed to the custody of the United States Marshal for the Northern District of California, to carry this judgment of deportation into effect."

A copy of the order of the United States District Court affirming the judgment of the U. S. Commissioner is attached to the petition as Exhibit "B." (Trans. Rec. pp. 7-8.)

The opinion of this Court affirming said judgment is reported in

Wong Chun vs. *United States*, 170 Fed. Rep. 182.

On July 13, 1909, a demurrer was filed on behalf of appellee (Trans. Rec. pp. 9-10) and on July 14, 1909, he filed his return to the order to show cause. (Trans. Rec. pp. 10-11-12-13-14.)

The demurrer challenged the sufficiency of the petition upon the following grounds:

I.

That said petition does not state facts sufficient to show that the said person therein alleged to be detained by this respondent is unlawfully imprisoned, detained, confined or restrained of her liberty by the respondent.

II.

That said petition does not state facts sufficient to show that the person therein alleged to be detained by respondent is entitled to the relief prayed for in said petition.

III.

That said petition affirmatively shows on its face that this respondent holds the said person under and by virtue of a valid order of a court of the United States which had full jurisdiction to make the same, and that such order is now in full force, effect and virtue.

The return alleged:

"That this respondent holds the petitioner who is called in said petition by the name of Mrs. Wong Heung in his official custody as United States Marshal for the Northern District of California, under the name of Wong Chun and that the time and cause of the detention of said petitioner are as follows, to wit:

That on the 27th day of September, A. D. 1907, E. H. Heacock, United States Commissioner for the Northern District of California, at San Francisco, after a due and regular hearing in that behalf duly and regularly made and entered his findings, judgment and order of deportation against the said Wong Chun, a copy of which is attached to the petition herein and marked Exhibit "A," to which reference is hereby made. That thereafter the said Wong Chun appealed to the District Court of the United States for the Northern District of California from said findings, order and judgment and that on the 7th day of February, A. D. 1908, the judgment of said United States Commissioner was by said Court duly and regularly affirmed. That a copy of the order of said District Court affirming said judgment is attached to the petition herein and marked Exhibit "B," to which reference is hereby made. That thereafter the said Wong Chun appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment aforesaid and that said judgment was by said United States Circuit Court of Appeals thereafter affirmed. That on the 7th day of July, A. D. 1909, after proper proceedings in that behalf were held, the said Wong Chun was in the District Court aforesaid ordered remanded into the custody of the respondent in execution of said findings, judgment and order of deportation and

said order affirming same. That respondent holds Wong Chun, in said petition called by the name of Mrs. Wong Heung, in his custody as such United States Marshal for the purpose of deporting her to China pursuant to the findings, order and judgment aforesaid. * * *

Respondent denies, upon his information and belief as aforesaid, that the status of the petitioner as a Chinese person illegally within the United States has been changed since the 7th day of February, 1908, to that of a person lawfully domiciled and resident within the United States. Respondent denies, upon his information and belief as aforesaid, that upon the 28th day of October, 1908, or at any other time or at all the petitioner was united in matrimony to Wong Heung in the city of Oakland, county of Alameda, State of California, or at any other place or at all.

Respondent denies, upon his information and belief, as aforesaid, that said Wong Heung is a native-born citizen of the United States of America and further denies that by said marriage or by any marriage or at all the status of the petitioner was changed from that of a Chinese person illegally a resident within the United States to that of the wife of a native-born citizen of the United States, and denies that as such the petitioner is entitled to remain a resident within the United States notwithstanding

the findings, judgment and order of deportation and the order affirming the same as aforesaid.

And respondent further answering to said petition upon his information and belief denies that said petitioner was married in good faith or at all to the said Wong Heung and alleges and avers upon his information and belief as aforesaid that any form of ceremony which may have been conducted or carried out between the petitioner and said Wong Heung was conducted and carried out solely with the intent and for the purpose of evading the judgment, findings and order of deportation as aforesaid and of enabling the said petitioner to remain within the United States notwithstanding the said findings, order and judgment."

A hearing was thereafter had, and testimony taken by the Court, as appears from the bill of excepitons. (Trans. Rec. pp. 17-51.)

On August 31, 1909, an opinion was filed by the learned Judge sitting in the United States Circuit Court and an order made denying appellant's application for writ of *habeas corpus*. (Trans. Rec. pp. 15-16-17.)

The opinion of the Court is in the following terms:

"In the matter heretofore heard and submitted before me upon an order to show cause why the writ of *habeas corpus* should not issue, I find from a consideration of the evidence introduced at the hearing

that all the allegations contained in the answer of the respondent C. T. Elliott, as Marshal for this District, are true; and I further find that the marriage of said petitioner to Wong Heung, as set forth in the petition and referred to in the answer of respondent, was not entered into in good faith, but was a mere sham, pretense, and form, had and entered into between petitioner and said Wong Heung, solely with the purpose and intent of evading the effect of the findings, judgment, and order of deportation theretofore had and then existing against said petitioner as alleged in said petition and answer, and to enable the said petitioner to remain within the United States, notwithstanding the existence of said order of deportation.

From these facts I conclude that said pretended marriage did not effect a change in the legal status of petitioner as it existed at the date the same was entered into, nor avoid the effect of the judgment and order of deportation aforesaid. Upon the foregoing facts and conclusions I hold that, within the principles of *Looe Shee* vs. *North,* 170 Fed. 566, and the cases there cited, the petitioner is not entitled to the writ of *habeas corpus.* The order to show cause is therefore discharged and the application denied."

ARGUMENT

FIRST:

THE LOWER COURT DID NOT ERR IN DENYING THE WRIT AND IN REFUSING TO DISCHARGE THE DETAINED AS THE WIFE OF A CITIZEN OF THE UNITED STATES.

Counsel devote considerable space in their brief to a discussion of the contention that the status of Wong Heung, the alleged husband of appellant, as a citizen of the United States, had been judicially determined, that his right to remain therein is unassailable, and that a citizen of the United States is entitled to the society and company of his wife.

We submit, however, that these considerations, in view of the facts of the present case, cannot control the decision here. It is true that the resident Chinese entitled to be in the United States, is, as a general rule, entitled to have with him his wife and minor children, although, by the letter of the law, they are not within a class favored with the right to come here and remain.

U. S. vs. *Gue Lim*, 176 U. S. 468; 44 L. Ed. 544.

U. S. vs. *Foo Duck*, 163 Fed. 440.

U. S. vs. *Joe Dick*, 134 Fed. 988.

The law was liberally construed so as not to work a cruel or inhuman result. The United States Su-

preme Court, in the well-known case of

Holy Trinity Church vs. *United States,* 143 U. S. 457; 36 L. Ed. 226,

held with respect to the general immigration statute prohibiting the importation of alien contract laborers, that while the letter of the law prohibited the importation of a minister of the gospel under contract, the case was not within the spirit of the law.

But because of the liberal and fair construction given by the courts to all the acts relating to the immigration of aliens, to prevent cruelty or inhumanity, it should not be held that the judicial interpretation adopted may be considered so lax as to allow a marriage, which is a mere subterfuge to avoid deportation, to confer a right upon the wife of residence in the United States.

The right of the Chinese wife or child who are not members of the exempt classes, to reside here by virtue of the residence of the husband, is a mere constructive right. It does not exist by virtue of any statute, but rests solely upon the reason that the husband is entitled to the association and companionship of his wife and children.

Where, however, the reason of the rule fails, the rule itself also fails. There is nothing in the mere contract of marriage, or in the mere going through an alleged form of marriage, which confers such a

right. A deserted, or a deserting wife would have no such constructive right. In other words, the existence of such a right, as before stated, depends solely upon the right of the husband to his wife's society and companionship. Where he has no such right and can acquire no such right, the reason of the rule fails, and the mere form of a marriage ceremony will not give the wife the right to remain in this country in the face of a judgment of deportation pronounced by all of the Courts of the United States having jurisdiction.

Appellant, in this case, was not only an alien unlawfully within the United States, at the time of her pretended marriage. She had been arrested upon such a charge, brought before a United States Commissioner, given a hearing, and the Commissioner had judicially determined, after hearing evidence, that the charge was true. She had appealed from this judgment to the District Court. Another hearing was there had, testimony was taken, after which the judgment had been affirmed. She had then appealed from the judgment of the District Court to this Court. She was under the direct control of this Court, she was under bonds to abide the judgment of this Court. While her case was in this condition, she attempted to flout the judgment of the Court below and to forestall the subsequent affirmance of that judgment by this Court, by going

through a pretended form of marriage with Wong Heung.

Can it be said that this alien, already under sentence of deportation, and pending an appeal from such judgment, may set at naught the authority of the Courts in a case actually pending before them, may render a judgment of this Court useless and inoperative and impossible of execution, by standing before a justice of the peace and going through a form of marriage such as is disclosed by the evidence here? We think not; and we confidently affirm that no case can be found in the books to sustain such a proposition.

Appellant, under the circumstances disclosed by this record, was incapable of contracting a true and valid marriage under the laws of the State of California, or, in any event, she was incapable of doing any act which would change the status she had at the time the pending case was first begun. Her alleged husband took her subject to her *adjudged status* as an alien unlawfully here, under judgment of deportation, and subject to the paramount and pre-existing right of the United States to deport her to China.

Where the marriage is a sham to avoid deportation; is not in good faith; is not intended to create a relation of lifelong companionship between a man and a woman, there is absolutely no reason for vary-

ing the letter of the law directing the deportation of the appellant.

Counsel quote at length from the case of *Tsoi Sim* vs. *U. S.*, 116 Fed. 925, decided by this Court, in an attempt to show that the wife of a citizen always takes the status of her husband, but in their quotation they leave out the following very significant language found on page 925, immediately preceding the portion quoted by them on page 8 of their brief:

"Appellant did not come to this country fraudu-
"lently, or in violation of any law. She did not get
"married in order to evade deportation. Her mar-
"riage was not fraudulent, but lawful, and in accord-
"ance with the usages and customs of our law."

The above language is very significant. It is a complete answer to the argument that the Tsoi Sim case is authority for discharging this appellant from custody, and is a very plain intimation from the Court that it would not permit a sham or fraudulent marriage to be used to evade a judgment of deportation.

We also desire to call attention to two other decisions of this Court which illustrate its attitude towards marriages of this kind:

See

United States vs. *Ah Sou*, 138 Fed. 775;

Looe Shee vs. *North*, 170 Fed. 566.

In the Ah Sou case there is an intimation, near the

top of page 777, that one who has fraudulently and unlawfully entered the country could not lawfully contract a marriage here.

In the Looe Shee case the Government alleged that the marriage of the woman in Mexico, to a citizen, was a sham to enable her to come to the United States. The District Court held that it was unnecessary to pass upon that question because the woman was a prostitute within three years of her coming. This Court reviewed the entire case and affirmed the judgment of the District Court.

These decisions certainly show that the mere fact of marriage will not protect against deportation.

The marriage here conferred no citizenship, because the husband was not of a class capable of being naturalized. Section 1994 of the Revised Statutes reads as follows:

> "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Section 14 of the Act of Congress approved May 6, 1882 (22 Stats. 617), reads as follows:

> "That hereafter no State Court or Court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

In the following cases the Courts have held that persons of the Mongolian race cannot be naturalized as citizens of the United States:

In re *Saito*, 62 Fed. 126.
In re *Gee Hop*, 71 Fed. 274.
Fong Yue Ting vs. *U. S.*, 149 U. S. 698; 37 L. Ed. 914.

In the case of *Leonard* vs. *Grant*, 5 Fed. 11, it was held that the clause in Section 1994 of the Revised Statutes "who might herself be lawfully naturalized," is satisfied if a woman claiming citizenship by marriage to an American citizen "is of the class "or race that may be lawfully naturalized under the "existing laws," and "upon this construction of the "act, and the assumption that the plaintiff is a 'free "white person,' she is a citizen of the United States, "and has been ever since her marriage to Leonard." (p. 19.)

In the case of

Kelly vs. *Owen*, 7 Wall. 496, 19 L. Ed. 283,

the Supreme Court of the United States held with regard to Section 1994 of the Revised Statutes:

> "As we construe this act, it confers the privilege of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. * * * The terms 'who might lawfully be naturalized under the existing laws,' only limited the application of the law to free white women. The previous naturalization act, existing at the time, only required that the person applying for its benefits should be 'a free white person' and not an alien enemy."

The fact that in this case the marriage could confer no citizenship upon appellant, while in the case of

Hopkins vs. *Fachant,* 130 Fed. 839,

cited in appellant's brief, a valid marriage *would* confer citizenship, constitutes one very important distinction between that case and this one.

A further perusal of the Hopkins case will show further distinctions, which demonstrate that that case cannot be invoked as authority for the position of counsel in this case. For instance, on page 842 of the opinion, the Court says:

> "It nowhere appears from the record that appellee has been given an opportunity to be heard before any officer or tribunal, either executive or judicial. The rigid construction of the act suggested by appellants is not justified by any of the decisions cited."

The Court then proceeds to quote from

> *The Japanese Immigration Case,* 189 U. S. 86; 47 L. Ed. 721,

as follows:

> "It has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country or remain in it depended, was 'due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' *Fong Yue Ying* vs. *United States,* 149 U. S. 698, 713, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Nishimura Ekiu* vs. *United States,* 142 U. S. 651,

659, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Lem Moon Sing* vs. *United States*, 158 U. S. 538, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082. But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law,' as understood at the time of the adoption of the Constitution. * * * It is not competent for the Secretary of the Treasury, or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized. This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution."

A further quotation to the same general effect is given from the case of

Gonzalez vs. *Williams*, 192 U. S. 1, 48 L. Ed. 317.

The Court then continues (pp. 842-843):

"Did the Court err in discharging appellee from custody? It will be observed by reference to the statement of facts that no particular

ground upon which the Court below based its order for discharging her is stated; but it does affirmatively appear that pending the application for her release under the writ of *habeas corpus* she was married to Alexander Fachant, who is stated in the petition for the writ to be 'a naturalized citizen of the United States of America.' It is claimed by appellants that this statement was denied by their return to the writ *ore tenus,* and that no testimony was offered by either of the parties upon the question of his naturalization. But an examniation of the facts shows that appellants did not deny this fact in their return to the writ. Their denial was confined to 'the allegations set forth in said petition herein as to the rights of the said Blanche Masclez to be and remain in the United States.' Her rights to be and remain in the United States under her petition were based solely upon the fact that she had brought suit against Alexander Fachant, who was a man of wealth, for damages for a breach of his promise to marry her, and that he had made default, and that her deportation under those circumstances would deprive her of substantial rights, and be 'in violation of the existing treaties between the United States of America and the Republic of France.' The Court had the right to take the fact alleged in the petition, and not denied by the return, to be true. The rule is well settled that her marriage to a naturalized citizen of the United States entitled her to be discharged."

These excerpts make it very evident that, as to the marriage of the woman to a citizen of the United States, this fact was not denied in the return, was therefore treated by the Court as admitted, and was held to entitle her to her discharge upon *habeas corpus.* The inference is very strong that, had there

been a proper allegation, as in this case, that no marriage had in fact taken place or that any pretended marriage was a mere sham and pretense, and had the Court been satisfied that such allegation was true, the decision would have been different, at least upon that point.

The decision in the Hopkins case was not, then, as counsel argue, that a mere form of marriage will avail to defeat a valid adjudication of the proper officers of immigration adverse to an alien, but, that an alien who has been ordered deported by such officers without an opportunity to be heard, may resort to the Courts by *habeas corpus,* and that the marriage of such alien, the validity of which is not denied by the return, whereby she becomes a citizen of the United States, entitles her to be discharged.

Counsel next cite in support of their position the case of

In re *Tom Hon,* 149 Fed. 842,

a case decided by Judge Whitson in the United States District Court for the Northern District of California, in which some of the same counsel appeared who appear in the present case. The distinction between them, however, is very evident. In the Tom Hon case, a judgment and order of remand had been rendered against the detained in a *habeas corpus* proceeding in the Northern District of California in 1890, which could not be executed because of the

failure of Tom Hon to appear, he having been admitted to bail. Thereafter, and while he was still at large, the Act of Congress of May 5, 1892, and the amendment of November 3, 1893, were passed, providing for the registration of Chinese entitled to remain in the country. Under these acts, Tom Hon applied to the proper Collector of Internal Revenue, who was charged with the duty of investigating his right thereto for a certificate of residence, which was duly issued to him. Upon an application by the Government for an alias order of remand, based upon that judgment, the Court held that the passage of the above acts by Congress and the issuance to the Chinese of a certificate thereunder, by an officer of the Government charged with the duty of investigating his right thereto, vacated the judgment previously rendered. There was no issue of fraud presented, as in the present case, and it was held that the judgment was vacated, not by the act of the Chinaman, but by the solemn act of the Government itself. The decision in the Tom Hon case, therefore, cannot avail as authority for avoiding the judgment involved in the present case.

SECOND:

THE MARRIAGE WAS NOT ENTERED INTO IN GOOD FAITH, BUT WAS A MERE SHAM, PRETENSE AND FORM, ENTERED

INTO WITH THE PURPOSE AND INTENT OF EVADING THE EFFECT OF THE PRE-EXISTING JUDGMENT OF DEPORTATION AGAINST APPELLANT.

In this very case, when previously before this Court on appeal from the judgment of deportation,

Wong Chun vs. *United States,* 170 Fed. 182, at page 184, the Court says:

> "The law is now well settled that the finding of the Commissioner, who sees and hears the witnesses and who reaches the deliberate conclusion that they are not entitled to credit, should not be reversed by an Appellate Court. *Lee Sing Far* vs. *United States,* 94 Fed. 834, 35 C. C. A. 327; *Ark Foo and Hoo Fong* vs. *United States,* 128 Fed. 697, 63 C. C. A. 249; *Hong Yon* vs. *United States* (C. C. A.), 164 Fed. 330; *Quock Ting* vs. *United States,* 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501; *Chin Bak Kan* vs. *United States,* 186 U. S., 193 Sup. Ct. 891, 46 L. Ed. 1121."

The principle here laid down must be applied to the findings of the Court below in this case. With this in view, let us examine briefly the evidence upon which the lower Court acted in its finding as to the intent and *bona fides* of this marriage.

The marriage was proposed by appellant. (Trans. Rec. pp. 29-43-48.)

It followed a one month's acquaintanceship. (Trans. Rec. pp. 29-40-48.)

Appellant at first defiantly refused to give her occupation. (Trans. Rec. 40-41-42-43.)

She evaded telling her exact place of abode. (Trans. Rec. p. 40.)

She did not give her alleged husband's place of abode. (Trans. Rec. p. 40.)

She could not give the location of any place where she had followed a legitimate occupation. (Trans. Rec. pp. 45-46.)

Although she herself had proposed the marriage, she went to Oakland to be married because her husband wanted her to (Trans. Rec. pp. 47-48), although both lived in San Francisco. (Trans. Rec. p. 40.)

She first says that she came to San Francisco about a month after her marriage, and then says that she went over to Oakland, got married, and came immediately back. (Trans. Rec. p. 47.)

The marriage occurred on the eve of an adjudicated deportation, between a Chinese woman ordered out of the country and an itinerant Chinese laborer, a laundryman, who says, "Sometimes I work at it and sometimes I do not," (Trans. Rec. p. 32) on a month's acquaintance, during which they "had gone to the park and taken walks in the street." (Trans. Rec. p. 48.)

This formal and *de facto* husband in the course of his examination, gave answer thus: (Trans. Rec. p. 30.)

> "Q. You knew of course that she was under judgment of deportation from the United States at the time, did you? A. No, sir.
>
> "Q. You did not know that? A. No, sir."

For ways that are dark, etc., even a female Chinese must be peculiar. It is possible, of course, that in the transports of this courtship which lasted for a month and was so much of the lady's volition, she forgot to tell him of the impending peril. When he found it out, if he thought her not very confidential, he must have thought her extremely clever.

He tells the Court (Trans. Rec. pp. 30-31) that although he was living in San Francisco and his intended bride was also living there, he went to Oakland to be married for the sake of getting the interpreter there. He says that he wanted this particular interpreter because he knew him. He says that any one would have done, but he was acquainted with this interpreter. The interpreter testifies (Trans. Rec. pp. 22-23) that he did not know either of these people, referring to the parties contracting the marriage, before the time of the ceremony before the Justice of the Peace. He says he never saw either of them in his life, and in fact is not positive of the identity of the Chinese man who was in court with the one who contracted the marriage.

This marriage was, we contend, manufactured for the occasion, to defeat the law, between a man whose occupation hedges around Chinese lotteries or who is in fact a laundryman, and a woman so ashamed of her dwelling-place that she evaded telling it until she

could cloak her case with the pretense of a decent occupation. This husband has been mixed up with breaches of the law. (Trans. Rec. pp. 32, 36.) By his answers, as hereinbefore indicated, he is proven false in at least one of his statements and many of the others are so highly improbable that the Court was justified in stating as it did (Trans. Rec. p. 33):

> "Mr. McGowan, I do not know what other witnesses you may have, but this one does not satisfy me of the *bona fides* of this marriage."

The wife also is not worthy of belief. The United States Commissioner refused to believe her in the matter which was before him. The District Court acted in the same manner, and this Court affirmed their judgment here. The Judge sitting in the Circuit Court in this proceeding, saw her and had an opportunity of judging as to her credibility. Even the report of her testimony in the Transcript of Record shows plainly that she was a defiant, evasive, disingenuous and entirely unsatisfactory witness. It is upon the testimony of two such witnesses as these that the *bona fides* of this so-called marriage is sought to be established.

We submit that there was ample evidence for the Court below to determine as it did, that the marriage was a sham and pretense and a fraud; that it was not in good faith, but was intended solely for the purpose of evading the effect of a judgment of this Court.

In conclusion, we respectfully submit that appellant in this case, if not guilty of an actual contempt of Court, is at least guilty of an attempt improperly and unlawfully to evade the effect of its judgments. We ask this Court to place its stamp of disapproval upon such doings as are disclosed by this record and we feel confident that such action will be sustained both by the law and the facts.

We respectfully submit that the judgment of the Court below was right, and should be affirmed.

Respectfully,

ROBT. T. DEVLIN,
United States Attorney.

BENJAMIN L. McKINLEY,
Assistant United States Attorney.

.....

Attorneys for Appellee.

No. 1791

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

MRS. WONG HEUNG,

Appellant,

vs.

C. T. ELLIOTT, United States Marshal, in and for the Northern District of California,

Appellee.

In the Matter of the Petition of MRS. WONG HEUNG for a Writ of Habeas Corpus.

APPELLANT'S REPLY BRIEF.

McGOWAN & WORLEY,
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Attorneys for Appellant.

Filed this.....day of April, 1910.

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APPELLANT'S REPLY BRIEF.

The brief of appellee having been served on counsel for appellant just immediately before this cause was orally argued before this Honorable Court, permission was granted appellant to file a reply brief in answer thereto, which concession appellant now avails herself of.

This appellant, a Chinese woman, under a judicial order of deportation for being a manual laborer

without the required certificate of residence, and hence illegally within the United States, contracted a marriage with a native born citizen of the United States and now as his lawfully and legally wedded wife, she, aided by her husband, is endeavoring to remain in this country to continue her marital relations with her husband and it is his desire that she should do so. This being his desire, they assert it is one of the inherent rights appertaining to his citizenship.

The district attorney cites the cases of Looe Shee v. North, 170 Fed. 566. Looe Shee was either the widow or the deserted wife of a citizen. Within three years after her entry into the United States and after her marriage, she was found an inmate of a house of ill fame and practicing prostitution. She was afforded a fair trial, and did not deny the above facts and she was ordered deported, by the Secretary of Commerce and Labor, from the United States to China. The courts were appealed to but no question of fact was raised, in truth all was conceded. Three points of law were presented. First, that the immigration law did not apply to Chinese. Second, that Looe Shee having lawfully entered the United States before this immigration act was passed, it should not have a retroactive effect. Third, that the wife or widow of a citizen could not be deported. This court held against the appellant on each of these three points. Upon the third point the court held that the status of a citizen's wife entitled her

to admission as such, but, being either a widow or deserted wife, if she was found an inmate of a house of ill fame within the prohibitory period of three years she was liable to expulsion as an undesirable alien, notwithstanding her said status. Looe Shee had her *day in court,* before the proper tribunal upon the precise issue as to whether she became an inmate of a house of ill fame and a prostitute within three years after her admission. *The marriage of Looe Shee to a citizen gave her admission to this country. By her own conduct she worked her own expulsion.*

We contend that this appellant's marriage to a citizen entitles her to admission, or being here, to remain. Her marriage is not a violation of the immigration law. The only point decided in the Looe Shee case which is applicable here is that the appellant has the right to enter or in this case to remain in the United States but that the right of future residence is to be determined by *her future conduct.* The immigration law itself contains its own machinery for the expulsion of such undesirable aliens and before the forum provided in the immigration law Looe Shee was called and had her day in court and was ordered deported. No such infraction of the law is laid at the door of this appellant nor has she ever been summoned before that tribunal to answer to any such charge as caused the deportation of Looe Shee. This appellant's right of residence was made secure

by her marriage. She is not now nor has she been charged with anything since this marriage which conferred her right of residence, that would tend to work a forfeiture of that right. In this essential and controlling feature are these two cases distinguished.

The district attorney comments on the case of Hopkins v. Fachant, 130 Fed. Rep. 839, cited in our opening brief, in a way which we believe is considerably misleading. The petition for the writ in that case did not allege marriage to a citizen for the reason that no such marriage then existed. The return of the government did not admit the marriage, as intimated in appellee's brief by denying certain other allegations of the petition. It was on the trial itself that the court took judicial notice of the marriage. *The marriage was subsequent to the pleadings of both parties to the suit.* The Fachant woman had her day in court before the tribunal created by the immigration law and was ordered deported and this order of deportation was in full force and effect and we believe undoubtedly safe from successful judicial review up to the time of the marriage in question. *It was unquestionably because no hearing was accorded her, upon the status as changed by the marriage, by the immigration tribunal* which had previously ordered her deported, that caused the judicial review.

That is the precise point here. We petitioned the court for relief because the detained had had no

hearing on her status as changed by her marriage. Both of these women were under good and sufficient orders of deportation, this appellant a judicial order, that appellant an executive one; this appellant because she had not procured a certificate of residence, that appellant because she was a prostitute and brought here for immoral purposes. They were then married to citizens of the United States. No hearing was accorded either upon their changed status and this it was that vested jurisdiction in the judicial branch of the government in the case of Fachant v. Hopkins and as we contend in the case at bar.

The district attorney lays considerable stress upon an argument to show that under Revised Statutes Section 1994 this appellant did not become a citizen. That is not necessarily an issue in this case for this reason: the right of residence in a wife may exist without citizenship as was held by this court in Tsoi Sim v. U. S., 116 Fed. Rep. 925, where they cite and approve this language:

> "I do not think that section 1994, Revised Statutes, applies to this case. There is no question of citizenship as to the wife involved. She does not apply to be landed because of any supposed right to be lawfully naturalized, but because she is the wife of a native born citizen of the United States. I do not think that her right to land depends on the status of her husband as a merchant, even assuming that the exclusion laws in this regard apply to a Chinese merchant who is a citizen of this country, but rather on her higher right not to be separated

> from her husband, who is a citizen of the United States, and is legally entitled to live in the country of his birth."

The district attorney makes an elaborate argument to show that this appellant is not worthy of belief. We reply by stating that the facts in issue here, the marriage and marital relation, are proven and established by documentary evidence which conclusively establishes the facts in issue. We hardly think that counsel would argue seriously that because a woman was unworthy of belief, she was thereby incapable of entering into a marriage.

The district attorney seeks on page 26 of his brief to invoke the doctrine enunciated by this court in deciding the deportation proceeding which preceded these proceedings, that the finding of the lower court, on the facts should not be reviewed or reversed by the appellate court.

We answer him by stating that the measure of proof laid down by the statute in a deportation proceeding is that the Chinese must prove to the satisfaction of the justice, judge or commissioner their right to be or remain in the United States. Theirs is the burden of proof and they are required to shoulder it. In this respect, in this especial proceeding, i. e., a deportation proceeding under the Chinese Restriction or Exclusion Acts, are the rules of evidence changed, but in no other. It may be assumed without argument we take it, that many Chinese born in this country have been unable to

meet this requirement and have suffered deportation. This appellant was unable to meet this requirement of the statute and though she at all times has stoutly maintained that she was born in the United States she was unable to satisfy the commissioner or the district judge on that point. In that proceeding it was we believe clearly evident that she had resided many years in this country, and we believed that she was born here. Her position is that having carried her case to the last court to which she could appeal and there had the lower judgment affirmed, she can but bow in submission to the court's judgment in the premises.

This present action is not a deportation proceeding under the Chinese Exclusion or Restriction Acts and hence the statutory rule does not apply. Being a habeas corpus proceeding which arises under the general law and to which the exclusion or restriction acts is foreign, we maintain that the general rules of evidence apply.

THE MARRIAGE AND ITS BONA FIDES.

As the vital point in this case would seem to be the marriage and its *bona fides* let us discuss this matter fully.

Marriage is one of the domestic relations, the regulation and control of which is not conferred upon the national government and therefore reposes in

the people of each State or the local State government.

Article X in amendment to the constitution of the United States.

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

In all matters, the regulation of which belongs, not to the national government, but to the individual States, the laws of the State wherein the matter has arisen shall apply.

WHAT IS THE "LEX LOCI"?

The people of the State of California, have embodied three sections in their constitution which we will quote as bearing on the marriage contract, for marriage is but a contract.

> Article I, Sec. 16: "No bill of attainer, ex post facto law, *or law impairing the obligation of contracts, shall ever be passed.*"
>
> Article XX, Sec. 7: "No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect."
>
> Article IV, Sec. 25: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:
>
> * * * * * * *
>
> "Fifth—Granting divorces.
>
> * * * * * * *
>
> "Thirty-third—In all other cases when a general law can be made applicable."

From this it will be seen that the regulation and control, as far as it has been deemed expedient to regulate and control marriage and divorce, rests with the legislature. The legislature has passed a number of laws regulating and controlling marriage, and as applicable here, we point out the following sections of the Civil Code of California, which relate to the validity of marriages:

> Sec. 55 of the Civil Code of California: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this code."
>
> Sec. 56 of the Civil Code of California: "Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage."
>
> Sec. 57 C. C. of Cal: "Consent to marriage and solemnization thereto may be proved under the same general rules of evidence as facts are proved in other cases."

The following sections of the Civil Code of California are cited as being on the authentication of marriages.

> Sec. 68 C. C. of Cal.: "Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article; but non-compliance with its provisions by others than a party to a marriage does not invalidate it."
>
> Sec. 69 C. C. of Cal.: "All persons about to be joined in marriage must first obtain a license

therefor, from the county clerk of the county in which the marriage is to be celebrated, which license must show:

"1. The identity of the parties.

"2. Their real and full names, and places of residence.

"3. Their ages and

"4. Whether white, Mongolian, negro or mulatto.

"No license must be granted when either of the parties, applicants therefor, is an imbecile, or insane, or who at the time of making the application, or proofs herein required, for said license, is under the influence of any intoxicating liquor, or narcotic drug; no license must be issued authorizing the marriage of a white person with a negro, mulatto, or Mongolian; if the male is under age of twenty-one years, or the female is under the age of eighteen years, and such person has not been previously married, no license must be issued by the county clerk unless the consent in writing of the parents of the person under age, or one of such parents, or of his or her guardian, is presented to him, duly verified by such parents, or parent, or guardian; and such consent must be filed by the clerk, and he must state such facts in the license. For the purpose of ascertaining all the facts mentioned or required in this section, the clerk, at the time the license is applied for, may, if he deems it necessary in order to satisfy himself as to matters in this section enumerated, examine the male applicant for a license on oath, which examination shall be reduced to writing by the clerk, and subscribed by him."

Sec. 70 of the C. C. of Cal.: "Marriage may be solemnized by either a justice of the supreme court, justice of the district courts of appeal, judge of the superior court, justice of the peace,

judge of any police court, city recorder, priest or minister of the gospel of any denomination."

Sec. 71 of the C. C. of Cal.: "No particular form for the ceremony of marriage is required, but the parties must declare in the presence of the person solemnizing the marriage, that they take each other as husband and wife."

Sec. 72 of the C. C. of Cal.: "The person solemnizing a marriage must first require the presentation of the marriage license; and if he has any reason to doubt the correctness of its statement of facts, he must first satisfy himself of its correctness, and for that purpose he may administer oaths and examine the parties and witnesses in like manner as the county clerk does before issuing the license."

Sec. 73 of the C. C. of Cal.: "The person solemnizing a marriage must make, sign, and indorse upon, or attach to, the license, a certificate, showing:

"One. The fact, time, and place of solemnization; and,

"Two. The names and places of residence of one or more witnesses to the ceremony."

It will be at once observed that the marriage herein questioned was entered into by parties competent to enter a marital contract, in this that they were over the minimum age; and that they were single people, and it further appears from the marriage license and certificate that the marriage was licensed, solemnized, authenticated and recorded as required by the laws governing the place where the marriage was entered into. The marriage license and certificate is itself evidence of these facts and the identity of the parties who entered into the marital relations

is also rendered conclusive because attached to the marriage license and certificate is a photographic likeness of each of the contracting parties. This should set at rest for all time any question which might arise as to who the parties to the marriage are, and that they were by the laws of the State of California, competent to contract and enter into matrimony.

Let us look a little further into the statutory law of the State of California. The following sections are from the Civil Code.

> Sec. 80 C. C. of Cal.: "Either party to an incestuous or void marriage may proceed, by action in the superior court, to have the same so declared."
>
> Sec. 82 C. C. of Cal.: "A marriage may be annulled for any of the following causes, existing at the time of the marriage:
>
> "One. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.
>
> "Two. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.
>
> "Three. That either party was of unsound mind, unless such party, after coming to reason, freely cohabit with the other as husband and wife.
>
> "Four. That the consent of either party was obtained by force, unless such party afterwards,

with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife.

"Five. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

"Six. That either party was, at the time of marriage, physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable."

Sec. 90 C. C. of Cal.: "Marriage is dissolved only;

"One. By the death of one of the parties; or

"Two. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

Sec. 92 C. C. of Cal.: "Divorces may be granted for any of the following causes:

"One. Adultery.

"Two. Extreme cruelty.

"Three. Willful desertion.

"Four. Willful neglect.

"Five. Habitual intemperance.

"Six. Conviction of felony."

Now then, this marriage is neither void, nor incestuous. There does not appear to be any ground enumerated upon which it could be annulled, if indeed the parties were disposed to so have it and they are not. There is no evidence of a divorce having taken place between the parties. This being so it must be held that these parties are man and wife and joined in legal wedlock.

Because these parties went to Oakland to be married when their residence was in San Francisco is no argument against the validity of the marriage. In fact, San Jose, San Rafael, Redwood City and Oakland, all of our neighboring county seats, enjoy quite a little popularity among people of our own race and color, who desire to be joined in wedlock. In fact, this husband had lived in Oakland for some time after the fire destroyed San Francisco four years ago. He was acquainted there. He had a friend, an interpreter, who lived there and he wanted him to help him in this marriage. He had this friend take him to Mr. Walsh, the attorney, to arrange matters. Mr. Walsh then procured the services of the official Chinese interpreter of Alameda County, Jee Gam, to interpret in obtaining the license and performing the marriage. The District Attorney misconceives the testimony when he states that the interpreter the husband wanted, as he was a friend of his, did not know him. It was Jee Gam who did not know the husband. The interpreter the husband referred to as his friend was the one who took him to Mr. Walsh, to have Mr. Walsh arrange the marriage.

The bringing of Jee Gam into the matter was at the request of Mr. Walsh. The husband also knows who Jee Gam is, as do most all of the Chinese in Oakland.

As the controlling question in the mind of the lower court was the intent, let us see the extent that

the Supreme Court of California has gone to uphold the marital contract. In Norman v. Norman, 121 Cal. Rep. 624, the court decided as follows:

> "The parties in the present case were residents of and domiciled in this state and went upon the high seas to be married with the avowed purpose of evading our laws relating to marriage. It seems to be well settled that the motive in the minds of the parties will not change the operation of the rule. Chief Justice Gray, in Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509, said: 'A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the laws of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature had clearly enacted that such marriages out of the state shall have no validity here.' This has been repeatedly affirmed by well-considered decisions. The authorities are found fully reviewed in that case, as they also will be found in support of the general rule in Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, by the same learned jurist. (See, also, as to marriages in evasions of the law of the domicile of the parties, Bishop on Marriage and Divorce, Sec. 880 et seq.) If the marriage in question can find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed, we should feel constrained by our code rule and well-considered decisions to declare it valid here, even though the parties were here domiciled at the time and went to the place where they attempted to be married for the purpose of evading our laws which they believed forbade the banns."

This is sufficient to lead us irresistibly to the conclusion that instead of being a hollow form or pretense, the ceremony performed here was a legal and valid one and the marriage springing from it a relation from which vested rights inhere to both the contracting parties. The husband is entitled to have his wife with him here in the land of his birth, and she is entitled to his care, protection and support in the home of their choice. The order of deportation that had been issued against Mrs. Wong Heung was not a bar to her entering into a valid marriage contract. It is to the laws of the State of California to which we must look to determine whether or not the appellant was competent to contract a marriage, and it is absolutely beyond question that she was entitled and competent to do so under the laws of this State. This order of deportation was not a stigma or stain to be borne through life and one that only death could remove. It acted to change her status from one subject to deportation to one exempt from it.

In submitting this matter we express the regret that we were not advised of this marriage in time to have called it to the attention of this Court at an earlier date. As it was, we were only advised of the marriage after we had sent word to the petitioner that she would have to be returned to China, in obedience to the order of deportation. We at once advised the court of the facts.

We earnestly believe that the appellant should be accorded the right of residence with her husband, which right she had and enjoyed until she was taken into custody. Possibly the court may remember that it developed in the application made for the admission of the appellant to bail, that the melancholia and depression which her incarceration caused her, brought about an attempt on her part to end her life, which attempt was all but successful. Thereafter this Honorable Court admitted her to bail, thus permitted her to resume her life with her husband. We think the appellant should be left to enjoy her life with her husband in the land of his birth, and believe that solution of this case to be in perfect accord with the Chinese Exclusion and Restriction Acts.

Respectfully submitted,

McGowan & Worley,

Louis P. Boardman,

Attorneys for Appellant.

No. 1787

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The United States of America,
Plaintiff in Error,
vs.
Frank Grosjean, J. D. Westfall and J. C. Grosjean,
Defendants in Error.

Upon a writ of error to the United States Circuit Court, for the Southern District of California, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

A. I. McCormick,
United States Attorney and Attorney for Plaintiff in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

As stated in the brief of plaintiff in error, the judgment of non-suit in the court below, from which this writ of error was taken, was granted on the sole ground that the contract having been annulled by the government,

could not now be affirmed by the government so as to form a basis for the recovery of damages as prayed for in the amended complaint, the motion for said judgment of non-suit having been made upon another ground, to-wit, that the cancellation of the original contract had limited the government to its only remedy, and that was damages for the cost of readvertising. (Brief of plaintiff in error, page 8.)

Defendants in error, in their reply brief, while not entirely abandoning these two points and still relying upon them with more or less force, suggest a new point not raised in the lower court, and, therefore, not considered in the opening brief of plaintiff in error. Upon this fact being made known to this court during the argument, plaintiff in error was given thirty days within which to prepare and file an additional brief on this new point.

The new point referred to, is this: Defendants in error in their reply brief (page 12, *et seq.*) urge that the new contract entered into by the government with Carter, after Grosjean had totally defaulted under his contract, and abandoned the work, and the work done by Carter under said new contract, constituted modifications or changes of the original contract with Grosjean, the effect of which was to release Grosjean and his sureties from all liability under the original contract and bond. They cite and rely upon the case of American Bonding Company v. United States, 167 Fed. 910, as sustaining their contentions on this point.

In discussing the alleged change or modification of the Grosjean contract, the brief of defendants in error, at page 13, says:

> "As we have already seen the Grosjean contract contained the specification: 'The first bridge to be about 40 feet span; that at Lake Vernon about 60 feet'; [Tr. p. 43, last Par.]. The Carter contract does not contain this specification. It should appear between the last two sentences in Par. 1 of Tr., p. 93, immediately following the word 'stringers.'"

This is the only difference between the two contracts suggested by the defendants in error.

It is contended by plaintiff in error that this alleged change or modification, was no change or modification at all; that the mere fact that the clause "the first bridge to be about 40 feet span; that at Lake Vernon about 60 feet" is omitted from the Carter contract, is entirely immaterial, and that notwithstanding this omission the Carter contract called for the exact work, labor and materials that was called for by the Grosjean contract.

This involves a consideration of the proper interpretation and meaning to be given to the two contracts. Preliminary to a discussion of this question, we deem it proper to state that, notwithstanding the rule of *"strictissimi juris,"* applied so often in favor of sureties, these contracts, and all contracts in which a surety is interested, are to be construed as any other contract; that is, according to the intention of the parties. This rule has been squarely laid down by this court in McMullen v. United States, 167 Fed. 460. Circuit Judge Gilbert, in delivering the opinion, says, on page 462:

> "The contract of a surety is to be construed as any other contract—that is to say according to the intent of the parties, and the rules for its construction are not to be confused with the rule that sure-

ties are favorites of the law and have the right to stand upon the strict terms of their obligation."

See also:

United States v. Freel, 92 Fed. 299-301.

The Grosjean contract [Tr., p. 42] provides that

"Article 1. That the said Frank Grosjean, party of the second part, furnishing tools and labor, shall: 1st—*Construct a bridge over Fall River in Hetch Hetchy Valley.* 2nd—Construct a bridge over Fall River just below Lake Vernon * * *."

The contract then specifies in detail, the character and description of the materials to be used in the construction of said bridges. Then follows the clause "the first bridge (the one in Hetch Hetchy Valley) to be *about* 40 feet span; that at Lake Vernon *about* 60 feet." (Italics our own.)

The words "about 40 feet span" and "about 60 feet" are words of estimate only, and relate to that which is otherwise definitely and precisely designated in the contract. These words are, therefore, not controlling; in fact, they are immaterial and may be rejected as surplusage.

Grosjean's contract required him to do a certain definite designated thing, viz., to bridge Fall River in Hetch Hetchy Valley. He must bridge Fall River in Hetch Hetchy Valley to comply with his contract, and if he had bridged Fall River in Hetch Hetchy Valley, he would have complied with his contract. He could not perform his contract by bridging only one branch of the river, no matter what the span of such bridge might be, nor could he comply with his contract by starting a

bridge on one bank of either the general stream, or a branch of Fall River, and extending it 40 or 50 feet and leaving it still in water at some distance, be it ever so small, from the other shore. The construction of 40 feet of bridge on Fall River in Hetch Hetchy Valley, is not the construction "of a bridge over Fall River in Hetch Hetchy Valley," unless the entire river is spanned.

Meaning of the Word "River."

The case of Schermerhorn v. Hudson River Railroad Company, 38 N. Y. 103, involved the construction and meaning of the charter of a corporation, which charter relieved the defendants from any obligation to maintain fences "where their railroad is constructed in the river." The alleged negligence consisted in defendants not maintaining fences along their railroad where it passed between a certain island and the mainland. The island was near the easterly shore of the Hudson River; the water on the easterly side of the island was called Schodack Creek, and is the water separating the island from the main shore. The defendants' road passed through and in this water, where it is of a width of 300 to 500 feet, and in depth from two to ten feet, varying with the tide. The question was whether this water was the Hudson River. The court said:

> "Within the fair meaning of the charter, the water through which the road was constructed at the place of the accident, was the river, and the exemption from the duty to fence the road was applicable.
>
> "There are in the river, in the vicinity of the place of the accident, several islands breaking up the waters of the river into many channels or strips of greater or less depth. The waters are thereby

> spread to a greater width, but these waters are, nevertheless, the waters of the Hudson River flowing downward in their course to the sea. It is not the main channel alone which constitutes the river; the water of the river surrounds the islands, and, for convenience, the different channels may have received different names, but they are the river still. Indeed, the term 'creek' itself properly imports a recess, cove, bay or inlet in the shore of a river, and not a separate or independent stream, though sometimes used in the latter meaning. Here, the waters so designated do, I think, plainly constitute a part of the river itself, as Schodack Island and the several other islands in the vicinity are islands in the Hudson, and a strip of water dividing the islands, or separating an island in the river from the mainland, and the spreading waters at the mouth of streams flowing into the Hudson river, are 'the river,' within the meaning of the charter, as they are plainly within its spirit and intent."

The word *bridge* is defined in the Century Dictionary as: "Any structure which spans a body of water, or a valley, road or the like."

The verb *span* is defined in the same work as: "To stretch from side to side, or from end to end; extend over or across; continue through or over the extent of."

The contract requires of Grosjean a definite designated thing, viz., the bridging of Fall River in Hetch Hetchy Valley. This being true, the additional words, said bridge "to be about 40 feet span," are words of estimate only and are to be disregarded.

In Pine River etc. Co. v. United States, 186 U. S. 279, 46 L. Ed. 1169, the Supreme Court, speaking through Mr. Justice Brown, in discussing this question, said:

> "There is no doubt whatever of the general proposition that where the words 'about' or 'more or

less' are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of wood or coal, or the cargo of a particular ship, or a certain parcel of land, the words 'more or less,' used in connection with the estimated quantity, are susceptible of a broad construction, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified. This doctrine is well illustrated in the case of Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622, where the contract was to deliver to a military post 880 cords of wood 'more or less,' as shall be determined to be necessary by the post commander, for the regular supply, in accordance with army regulations of the troops and employees of the garrison of said post. It was held that the latter were the determinative words of the contract, and the quantity, designated at 880 cords, was to be regarded merely as an estimate of what the officer making the contract at the time might suppose would be required; and that the government was not liable for more than 40 cords of wood which was accepted by the officers. So in Watts v. Camors, 115 U. S. 353, 29 L. Ed. 406, 6 Sup. Ct. Rep. 91, it was held that where a ship was described in a charter party as of the burden of 1,100 tons, 'or thereabouts,' registered measurement, the charterer was bound to accept her, although her registered measurement, unknown to both parties, was 1,203 tons."

Pembroke Iron Co. v. Parsons, 71 Mass. (5 Gray) 589, involved a contract by which the defendant agreed to sell "a cargo of old railroad iron to be shipped per bark Charles William * * * at $30 per ton * * * delivered on wharf at Boston * * * about 300 or 350 tons." The bark mentioned was of 298 tons registered capacity only. Defendant placed on board said

bark only 227 tons, conveyed the same to Boston and delivered said 227 tons to plaintiff. Plaintiff demanded the balance and the defendant refused. The Supreme Court of Massachusetts, per Chief Justice Shaw, said:

> "Whether the plaintiffs knew of the capacity of that vessel or not, is immaterial because they agreed to, and adopted it as the descriptive measure of their purchase. The figures at the bottom 'about 300 or 350 tons' are entitled to be taken as part of the contract. But taken with the context they manifestly expressed an estimate only and do not control the descriptive course designating and limiting the subject of the contract. The defendant having delivered a full cargo, has performed his contract, and the instructions of the judge were correct."

See also:

Purington v. Sedgley, 4 Me. 283;

Johnson v. Pennel's Heirs, 2 Wheat. (U. S.) 206; 4 L. Ed. 221.

What has been said concerning the bridge to be built in Hetch Hetchy Valley, applies equally to the bridge just below Lake Vernon.

Carter's contract required him to build the same bridges, to-wit, one over Fall River in Hetch Hetchy Valley, the other over the river just below Lake Vernon. The wording of the two contracts in this respect, is identical. He, like Grosjean, had to completely bridge the river. In this respect, no more was required of him and no less. Hence there was no change in this respect in the two contracts.

As heretofore stated, the omission of the clauses relating to the estimated length of the bridges is the only change suggested in the brief of defendants in error.

However, there is one other difference between the two contracts, which, although not pointed out by defendants in error, we feel, in fairness to this court, should be here noted and discussed. In the Grosjean contract [Tr., p. 42] after the clause in which Grosjean agrees to: "2nd—Construct a bridge over Fall River below Lake Vernon," is found this language relating to said last mentioned bridge:

> "it being required that the approaches thereto connect with the trails running from Till-Till Valley to Lake Eleanor passing by Lake Vernon, that is, if the bridge is built not where the present trail crosses, the contract will include the constructing of regulation trails from the bridge to the above mentioned trail."

This clause last mentioned is not found in the Carter contract. In all other respects, except as hereinbefore mentioned, the two contracts are precisely identical.

It will be noted that this clause was to have effect only in one contingency, viz., if Grosjean concluded to build the Lake Vernon bridge (he not being requested to build it in any specific place) some place other than where the present trail crosses Fall River. In that event, he was required to do something more than merely build the bridge, viz., to construct trails from the bridge so built, to the present trails. Therefore, if the omission of said clause from the Carter contract is at all material, it amounts simply to this, that in one contingency Grosjean *might* be compelled to do *something in addition to what Carter was required to do* under his contract, viz., to connect the bridge with the then existing trail. In other words, Grosjean agreed to do everything that Car-

ter agreed to do, and under a certain contingency, to do something more than Carter agreed to do. The effect of this would be that *Carter's work would cost less than Grosjean's.*

The omission of the clause concerning the trails to the bridge near Lake Vernon, from the Carter contract, is entirely immaterial in this case. The government is seeking to recover damages by reason of the total default and abandonment of Grosjean in the construction of any of the bridges required by his contract. *We are not relying upon any measure of damages or mode of ascertaining damages prescribed by the contract itself.* Indeed, the contract is entirely silent as to the measure of damages or as to what the government may or must do in the event of the total default and abandonment of the contract by the contractor.

This being the case, upon the default and abandonment by Grosjean, the government's cause of action immediately accrued. It was entitled to recover as damages, whatever it would cost to place itself in the position it would have occupied had Grosjejan completely performed his contract and built the bridges as his contract required. This is the law of damages and this right exists independent of any express clause of the contract which has been breached. One means of arriving at the amount of damages is by the testimony of qualified witnesses as to what would be the reasonable cost of doing the work which Grosjean agreed to do; another way, in case the government has had the work

done, is by proving what it actually did cost to do the work.

Sedgwick on Damages, 8th Ed. Vol. 2, 615-617, inc.;
Simmons v. Whitman, Mo. App. 88, S. W. 791;
Kidd v. McCormick, 83 N. Y. 391 at 397;
Sutherland on Damages, 3rd Ed. Vol. 3, Sec. 699, P. 2115;
King v. Nichols, 53 Minn. 453, 55 N. W. 604;
Griffin v. Ogletree, 114 Ala. 343, 21 Sou. 488;
Anderson v. Nordstrom, 60 Minn. 231, 61 N. W. 1132;
Florence Mach. Co. v. Daggett, 135 Mass. 582;
Sillivant v. Reardon, 5 Ark. 140 at 156;
Hirt v. Hahn, 61 Mo. 496;
Carli v. Seymour, 26 Minn. 276;
Jones v. City of New York, 65 N. Y. Supp. 747.

See also cases cited in opening brief of plaintiff in error, page 43, especially Goldsboro v. Moffett.

In Kidd v. McCormick, 83 N. Y. at p. 397, Folger, judge, after referring to the lack of harmony in the expressions of judges on this question, said:

> "I apprehend, however, that it has been principally in pointing out the kind of testimony by which the amount of damages was to be got at rather than in the rule that was to govern. Stated in its broadest form the plaintiff is to have that compensation which will leave him as well off as he would have been had the contract been fully performed. With more particularity he has a right to a house as good as that which the defendants agreed to furnish; and his damages is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by

> which that difference may be made known, is that of experts saying what would have been the value of one and what is the value of the other. Another kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is when the house has been, in fact, finished up to that mark, what it did in fact cost to furnish it. But these ways all lead to the same end: what is the difference in value between the unfinished house and a house had it been finished as agreed upon. * * *"

In 2 Sedgwick on Damages, 8th Ed., Sec. 616, the author, after quoting approvingly from Kidd v. McCormick, *supra*, used the following language:

> "This clear explanation of the matter, and the distinction it points out between the methods of proof and the measure of damages, is important. Nevertheless, the courts have not always been precise in the language which they have employed, and besides this it often happens that only one of these methods of getting at the elements of damage is resorted to when it will make no practical difference whether we say that the damage is the difference in value with and without the labor, or the cost of completion. Strictly speaking, however, the cost of completion is always a matter of evidence.
>
> "Generally, upon the defendant's failure to perform the work the plaintiff may recover the expense of having it done elsewhere, or if the consideration has not been paid in advance the difference between such expense and the contract price."

It follows from this rule that the only part that the new contract with Carter plays in the case at bar, is *as evidence of measure of damages.* It is merely an item or piece of evidence going to show what damages the government is entitled to. The thing to be ascertained is what did it cost the government to obtain that which

Grosjean agreed to do for the sum of $585? The Carter contract is nothing more than a piece of documentary evidence going to prove this fact. Such being the case, it makes no difference whether the two contracts are, or are not, identical, nor is it material that the Carter contract does not call for as much work as does the Grosjean contract, if such be the case. All the work called for by the Carter contract is included in the Grosjean contract. Each contractor agreed to build a bridge over Fall River in Hetch Hetchy Valley and a bridge over Fall River just below Lake Vernon; it cost the government $315 more to have these bridges built than Grosjean agreed to build them for. In fact, Grosjean agreed to do more than build the bridges, viz., to construct the trails leading to the Lake Vernon bridge, under a certain contingency. But it cost the government $900 to have the work done without these trails, hence it was certainly entitled to the excess cost of $313.

This precise point, viz., that a change in the new contract under circumstances similar to those in the case at bar, is immaterial, and does not affect the liability of a contractor or his sureties, has been decided in the following cases:

George A. Fuller Co. v. Doyle, 87 Fed. 687;

U. S. v. Stone, Sand and Gravel Co., 177 Fed. 321 (C. C. A., 5th Circuit);

U. S. v. Maloney, 4 App. D. C. 505

City of Winona v. Jackson, 92 Minn., 453; 100 N.W.,

case at bar on this and other points. The action was on a bond against a contractor and his sureties, the com-

plaint counting on the bond and alleging that Doyle, the contractor, *soon after commencing the work* required by his contract, totally abandoned the same and that plaintiff afterwards performed the work and labor, and in so doing necessarily had reasonably expended $4765.93 in excess of Doyle's contract price. The court said:

> "This brings me to consider the following issues raised by the pleadings: First. What is the reasonable value of the work done by the plaintiff in completing the performance of Doyle's contract after he abandoned it? * * * Fifth. Does the fact that the plaintiff, after Doyle abandoned the performance of the contract altogether, made some changes in executing the details of the work, as specified in the answer, constitute a defense in favor of the trust company?
>
> "I will consider these issues in the order stated.
>
> "And, first, as to the reasonable value of the work done by the plaintiff in completing the performance of Doyle's contract. * * * It appears that, after Doyle abandoned the work, the plaintiff, as it progressed with it, varied from particular specifications, in the respects specified in the defendant's answer, by using certain enamel brick where light buff brick were specified, and by using cement in place of mortar for certain parts of the work, and by substituting certain other kinds of brick where hollow brick were specified, and in setting certain terra cotta which was not specified in the Doyle contract. In making up and stating its account of the material furnished and work done, plaintiff embraced all the work done by it in one account, and gives credit to the defendants for all the excess in value of the work not included in the Doyle contract, over and above the value of the work called for by that contract. I am satisfied from the evidence that full credits were allowed to the defendants for them, and that the amount sued for, namely, $4,765.93, is the reasonable value of the materials necessarily furnished and the labor necessarily done by the

plaintiff in furnishing the materials and doing the very work which Doyle ought to have done, but failed to do. * * *

"The next issue tendered by the answer is whether the changes made by the plaintiff in executing the details of the work, as already specified, after Doyle had abandoned it, constitute any defense on the part of the surety. Plaintiff's cause of action accrued at the time Doyle abandoned the work, and such abandonment constitutes the breach of the bond sued on in this case. While the court must carefully consider any and all changes made in the progress of completing the work by the plaintiff, with a view of accurately ascertaining the actual cost of finishing the very work contracted to be done by Doyle, it cannot, in my opinion, treat these changes as modifications of the contract between plaintiff and defendant Doyle. Before plaintiff undertook the work, the contract had been broken by Doyle, and plaintiff's rights and Doyle's obligations under it had become fixed. If plaintiff made any changes in the details of the work in the progress of completing it, they were not made as a result of any agreement between it and Doyle, such as usually operate to discharge a surety, and such changes imposed no new or modified obligations upon Doyle. He had already failed to perform his contract, and abandoned the work, and plaintiff's cause of action had arisen thereupon, and, in my opinion, the surety's liability is in no manner affected by the fact that plaintiff, while it was doing the very work which Doyle had contracted to do, did, of its own motion, some other things, for the doing of which no claim is made against Doyle or his surety. The evidence offered by the defendant to prove the changes referred to at the trial was, on the objection of the plaintiff, ruled out, and I think no error was committed in so doing."

In the Stone, Sand and Gravel case *(supra)* one of the defenses raised by the contractor and his sureties was

"that the terms and conditions of the new contract differed from those contained in the original contract, by which changes, terms and conditions the United States abandoned the original contract; and the surety was thereby released from obligation on its bond; *and, further, that the new contract, so changed forms no basis for measuring damages for the breach of the original contract.*"

And upon writ of error by the United States, the defendants contended, among other things, "that the new contract differs so materially from the original contract that it forms no proper measure of damages for the default of the original contractor, and in effect operates a discharge of the original contract."

In discussing this question the court said:

> "With reference to the new contract, no recovery is sought on it in this action. And it is not apparent to us how the so-called 'substitutions' complained of can or could in any case affect the rights or liabilities of the defendants under the original contract.
> * * *
>
> "Wherein the new contract differs, the difference is in favor of the contractor.
>
> "We conclude that both of the assignments of error are well taken. All of the work done under the new contract was embraced under the original contract; it was done under substantially the same specifications and stipulations, and it was shown to have cost the precise amount claimed in the petition. We think there is no substantial defense pleaded to the action, and on the trial there was no offer of proof tending to question the damage to the plaintiff in the amount claimed, and that amount was fully proved by competent evidence and the admission of the defendants."

So far as the omission of the clause concerning the trails to connect at Lake Vernon bridge is concerned, it

is similar to a case where A agrees to sell and deliver to B three horses of a certain quality for the sum of $300, and then defaults and refuses to perform his contract, whereupon B goes into the open market and is compelled to pay $400 for only two horses of the same quality. Certainly B is entitled to damages in at least the sum of $100 for A's breach of contract.

Again, if these differences in the two contracts, viz., the omission concerning the estimate of the length of the spans, and the omission concerning the connecting trails near Lake Vernon, can be characterized as "changes" at all, they are of the character of those changes referred to in the case of Benjamin v. Hillard, 23 How. (U. S.) 149, 16 L. Ed. 518, in which case the Supreme Court said:

> "It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time of the performance of his duty, will not discharge his surety or guarantor. There must be another contract substituted for the original contract, or some alteration in point so material as, in effect, to make a new contract, without the surety's consent, to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, *mutually accommodate each other, so as better to arrive at their end, we can find no ground for the surety to complain.*" (Italics ours.)

See also:

Fertig v. Bartles, 78 Fed. 866;

U. S. Glass Co. v. Matthews, 89 Fed. 828;

Am. Surety Co. v. Choctaw Const. Co., 135 Fed. 487, at 489;

Stevens v. Elver, . . . Wis. . . . , 77 N. W. 737;
Haines v. Gibson, 115 Mich. 131.

The fact that Carter, in the performance of his contract, saw fit to and did build a bridge over each branch of Fall River in Hetch Hetchy Valley, instead of one single bridge above the forks, is immaterial. As heretofore stated, his contract simply required him to bridge the river in the valley. He could build either one bridge above the forks, or one over each branch, and comply with his contract. This was also true concerning the Grosjean contract. Major Benson made no objection to Grosjean's request to be allowed to bridge each of the branches in the valley, but, on the contrary, agreed to accept the work as a compliance with Grosjean's contract. This consent on the part of Benson, to the request of Grosjean, was not a new agreement. A written contract can be altered or modified only by another written contract, or an executed oral agreement.

Civil Code of California, Sec. 1698.

The statement in Benson's testimony [Tr., p. 111] "as a result of our conversation, he was to carry out his contract by building a bridge below Lake Vernon and a bridge above the division, or in place of building one above the division, to be allowed to build a bridge over each of the branches. I agreed to that alteration of the contract. I had a right to make a modification of the contract for the purpose of arriving at the object for which the contract was made, viz., to bridge that river, whether he built but the single bridge, or granting him permission to put two in the place of one if he so de-

sired," so far as the words "alteration" and "modification" are concerned, is merely a conclusion of the witness. Besides, it is plainly evident from the whole of Benson's testimony, that, in his opinion Grosjean would have performed his contract according to its true intent and meaning, by constructing bridges over each of the branches of Fall River in the valley, independent of any express authority from Benson so to do.

[See testimony of Benson first Par. on page 110 of transcript, and page 112.]

In the last sentence on page 118 of the transcript, Benson testified that if Grosjean had constructed a bridge over each of the branches, he, Benson, "would consider it a completion of the contract if he had bridged the river."

The building of a bridge across each of the branches instead of one above the forks, was favorable to the contractor and to the government. The construction of two bridges would cost less and would be much simpler and more satisfactory to both the contractor and the government than the construction of a single bridge above the forks.

[Testimony of Benson Tr., pp. 112 and 116.]

Hence the defendants have no right to complain.

But in addition to this, the evidence shows the reasonable value of the work called for by the Carter contract to be $900 [Tr., p. 123]. As heretofore stated this work was the same as that called for by the Grosjean contract, and, therefore, whether one or two bridges were built by Carter in Hetch Hetchy Valley is immaterial.

Again, Carter testifies [Tr., p. 121] that Grosjean admitted to him that "it would be easier to put in two bridges than to put in one" and Benson testified [Tr., p. 87] that Grosjean said to him that he (Grosjean) "thought it would be easier to build these two bridges than one."

Defendants in error rely upon the decision of this court in American Bonding Company v. United States, 167 Fed. 910, as decisive of the question of the effect of the alleged changes in the contract in their favor. That case and the authorities cited therein, are clearly distinguishable from the case at bar. This contention of ours is amply supported by the very quotation from the American Bonding Company case found at page 10 of defendants' brief, to-wit:

> *"This is not a suit to recover generally whatever damages the United States will have sustained had Axman abandoned his contract, but suit for damages under the express stipulations of the contract which are set forth in this complaint and made a basis of the action."* (Italics ours.)

On the contrary, the case at bar is a suit to recover generally whatever damages the United States has sustained by reason of Grosjean's having abandoned his contract, and is not a "suit for damages on the express stipulations of the contract." The decision in the Bonding case is based entirely on the fact that the government in that case, planted itself squarely on a clause of the contract which prescribed the measure of damages, and what the government must do in order to be entitled to damages. The court held that the government had not fulfilled the conditions laid down by the contract,

which were conditions precedent to its right to recover damages. That there is a fundamental difference between the two cases appears from the citation of the case of American Bonding etc. Co. v. Gibson County, 127 Fed. 671, found on page 919 of the decision in the American Bonding case in the 167 Fed. In quoting from the Gibson County case, this court, on said last mentioned page, uses this language:

> "This is not a case like Fuller Co. v. Doyle, (C. C.) 87 Fed. 687, where the contractor, without doing any substantial work, abandoned his contract, but a case where the contractor, having done all the work except that covered by the last payment, had his employment terminated under article 5, through a strict compliance with its provisions. The damages sought to be recovered here are not damages outside the contract but damages under the contract, resulting from a violation of its provisions."

In that case the Fuller case, which we have cited and rely upon, is distinguished and it is stated that a different rule would have been announced if the facts were similar to the Fuller case.

The attempted distinction by defendants (defendants' brief, page 12) of the case of Philadelphia R. Co. v. Howard, cited by plaintiff in error, is without merit. "The party of the first part" in the quotation, was the plaintiff in the case. There was no provision that after annulment his rights should be protected, yet he was allowed to recover.

It is stated in defendants' brief that Benson demanded that Grosjean construct two bridges in Hetch Hetchy Valley (defendants' brief, page 6) and that he "build 83 feet of bridge" (defendants' brief, page 5). These

statements are totally unwarranted by the evidence, and are squarely contradicted thereby. The talk of the third bridge came entirely from Grosjean. It was at his request that Benson consented to allow him to build two bridges instead of one in the valley. Benson never requested of him that he do anything more than his contract required, viz., to bridge the river in Hetch Hetchy Valley.

Carter paid Grosjean for all the bolts received by him from Grosjean [Tr., pp. 122 and 123]. The only thing in the case justifying counsel's statement as to the number of days Grosjean had been working when he quit, or as to how many animals he used, or as to how far he had traveled to his camp, is the letter of Grosjean to the secretary of the interior [Tr., p. 124]. This certainly is not evidence of its contents in favor of its author.

On the question of the alleged annulment discussed in our opening brief at pp. 21, *et seq.*, we desire to cite the following additional authorities:

U. S. v. Maloney, 4 App. D. C. 505;
Roehn v. Horst, 178 U. S. 1, 44 L. Ed. 953.

In the case last cited, the Supreme Court of the United States quoted with approval, the opinion of Lord Esher, master of the rolls, in the leading English case of Johnstone v. Milling, L. R. 16 Q. B. Div. 467, using this language:

> "In Johnstone v. Milling, L. R. 16 Q. B. Div. 467, Lord Esher, master of the rolls, puts the principle thus: 'When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, de-

clares his intention then and there to rescind the contract. *Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitled the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission.* The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."

We respectfully submit that the judgment should be reversed and a new trial granted.

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